Supreme Court, U.S.
FILED

041572 MAY 17 2005

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No.

IN THE
Supreme Court of the United States

October Term, 2005

MARCUS S. MINIX, SR.

Petitioner

v.

STEPHEN N. FRAZIER, GEORGE CHAD PERRY, GEORGE KEITH WELLS, PHILIP LESLIE, AND THE LAW FIRM OF MCBRAYER, LESLIE, MCGINNIS, AND KIRKLAND, PLLC

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF THE SIXTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

This is the first time to review a procedural due process claim, in which a state court judge, after disqualification for cause, appointed himself back on the case as his own special judge. In doing so, he reversed the orders of the court in favor of a party to the proceeding who was his wife's good friend and social sorority sister.

I. Whether state's procedure for appointing a special judge is constitutionally adequate, where a judge, subsequent to disqualification, was able to appoint himself as his own special judge 11

II. Whether supervisory power under SCR 10.1(a) should be invoked, where petitioner's *prima facie* claims of judge's abuse of power were met be Federal Court issuing orders for him to pay over $12,000 in opposing attorney fees 16

III. Whether § 1983 is invoked because the only remedy available to petitioner is federal under *Parratt-Hudson*, where the State had no tort remedy available for petitioner to have returned his property and children which he lost due to nullities of a disqualified judge 18

IV. Whether respondents are liable for petitioner's loss of liberty and property, where it is alleged that attorneys conspired with a judge "acting in the clear absence of jurisdiction," *Bradley v. Fisher,* 13 Wall. 335, 351 (1872) 22

PARTIES TO THE PROCEEDING BELOW

Petitioner:

Marcus S. Minix, Sr., Pro Se

Respondents, all sued in their individual capacities only:

Stephen N. Frazier, in two capacities: (1) elected Judge of the Johnson Circuit Court, Paintsville, Johnson County, Kentucky; and (2) appointed chief regional circuit judge of the mountain region of Kentucky

George Chad Perry, Kentucky attorney

George Keith Wells, Kentucky attorney

Bruce Leslie, Kentucky attorney

The Kentucky Law Firm of McBrayer, McGinnis, Leslie and Kirkland, PLLC (MMLK)

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF THE SIXTH CIRCUIT COURT OF APPEALS

Marcus S. Minix, Sr., *Pro Se*, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Opinions Below

The opinion of the Sixth Circuit Court of Appeals is not reported, and appears appended to this Petition. App. A, p. 1a. The order denying Petition for Rehearing and Suggestion for Rehearing *En Banc* is appended to this Petition. App. C, p. 20a.

The District Court's ruling which granted Motion for Summary Judgment to Leslie and McBrayer is not reported. App. B, p. 4a. The order denying reconsideration is not reported. App. D, p. 21a

The orders granting attorney fees to George Chad Perry, Judge Stephen N. Frazier, and George Keith Wells are appended as Appendices E, p. 28a; F, p. 40a; and G, p. 52a , respectively.

Jurisdiction

Jurisdiction is proper in this Court. The judgment of the Court of Appeals was entered on December 3, 2004. On February 28, 2005, the Court of Appeals denied a Petition for Rehearing and Suggestion for Rehearing *En Banc* filed by Petitioner. App. C, p. 20a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Relevant Laws

This case involves the Fourteenth Amendment of the U.S. Constitution, Rule 56 of the Federal Rules of Civil Procedure and 42 U.S.C. §§ 1983, 1985(2) and 1986. These relevant laws are set forth in the appendix. App. L, p. 72a

STATEMENT OF THE CASE

Summary of the Factual Dispute

Five material facts supported by unrefuted State Court orders are as follows: (1) in 1986, respondent Judge Stephen N. Frazier voluntarily disqualified from the Minix divorce; (2) subsequently, Judges James A. Knight and Edward Manual granted dissolution, required the children to live in Paintsville, Kentucky and denied relocation of the children by Sherry Minix ("Wolf"), Minix's former wife; (3) in 1989, Frazier appointed himself as his own special judge; (4) in 1990, Frazier granted property settlement and relocation of the children to Minix's former wife, Sherry Minix ("Wolf"); and (5) in 1995, mandamus issued ruling all of Frazier's special judge appointments and orders *void ab initio* of his first disqualification in 1986. App. H, p. 59a and I, p. 61a.

The question is whether there was a cure for such null orders, i.e. whether there was a retrial of the issues which resulted in such nullities. Petitioner contends that there was not a cure or retrial. Two of the five respondents, Bruce Leslie and the McBrayer Law Firm, contended that there was in their Motion for Summary Judgment. App. J, p. 64a.

State Court Facts Alleged in Federal Complaint

The facts range almost 20 years. In 1986, Minix filed for divorce from Wolf in the Johnson Circuit Court, Paintsville, Johnson County, Kentucky. The case was assigned to Frazier who immediately and voluntarily disqualified because he knew the parties very well. It is also well-known that the judge's wife, Carol Frazier, was good friends and social sorority sister with a party to the proceeding - Wolf.

The case was transferred to Judge Knight who, in 1987-88, granted divorce, abated property settlement pending Minix's bankruptcy and found it in the "best interest of the children" to remain in Paintsville under joint custody.

On January 15, 1989, Wolf loaded a truck with marital furniture and moved to Ashland, Kentucky, 120 round-trip miles away from Paintsville. She left both children behind with Minix. On January 18, 1989, Minix filed a motion for sole custody. Before a hearing was held, Judge Knight voluntarily disqualified because his niece-in-law, Anna Melvin, Esq., had become Wolf's attorney.

Minix, in his *sub judice* complaint, contended that the sixteen (16) following overt actions comprised a judicial conspiracy for the single purpose of depriving him of property and children. Minix divided the conspiracy into two separate abuses of process: the first concerns respondents Frazier, Wells and George Chad Perry; and the second, special judge Charles E. Lowe, Jr. and the respondents Leslie and the McBrayer Law Firm.

First Abuse of Process

(1) On January 18, 1989, Frazier purported to act as chief regional circuit judge by claiming authority to assign a special judge.

(2) On January 25, 1989, Frazier purported to assign himself as his own special circuit judge and (3) on January 27, 1989, scheduled a hearing on Minix's motion.

(4) Minix's attorney, George Chad Perry, directed Minix to appear at such hearing where (5) Frazier denied Minix's motion and permitted Wolf to move back.

(6) On July 21, 1989, Frazier purported to direct the parties to complete proof in the relocation case and (7) on July 21, 1989, appointed Respondent George Keith Wells as domestic relations commissioner for the divorce.

On September 7, 1989, special Judge Edward Manual assumed all of Frazier's cases. In the divorce case, Manual entered an uncontested order specifically denying Wolf's request for sole custody and relocation of the children.

(8) On February 15, 1990, Wells, after holding hearings, entered a Supplemental Decree purporting to recommend to Frazier that Wolf be granted property settlement, sole custody and relocation of the children, and reduce Minix's parental time by 70%.

(9) On May 18, 1990, Frazier purported to adopt Wells' Supplemental Decree as his decision.

Wolf took the property and children and moved to Ashland. Minix contended below that this was an egregious error and for example, denied his right to be heard "before the State deprive[d]" him of "liberty or property," *Zinermon v. Burch*, 494 U.S. 113, 127 (1990) citing *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542 (1985).

Minix filed seven (7) State Appellate Court procedures trying to get his property and children back. Michael D. Osborne, Esq., filed Minix's direct appeal wherein the Court of Appeals on April 9, 1991, abated the property settlement and on January 31, 1992, affirmed the children's relocation ruling that any impartiality of Frazier was "best handled by KRS 26A.015 [Kentucky's disqualification statute]". Osborne filed a Motion for Discretionary Review for Minix which was denied by Chief Justice Stephens of the Kentucky Supreme Court.

On July 29, 1993, the U.S. Bankruptcy Court entered an order abandoning the Minix marital household furniture at a value of $27,174.

On May 17, 1991, Frazier disqualified a second time and purported to appoint Judge Kelley Asbury as special judge. On January 4, 1993,

Minix unsuccessfully filed a motion under CR 60.02 requesting Asbury to return the children. Joseph Rosenbaum, Esq., filed direct appeal for Minix wherein the Court of Appeals on May 6, 1993 ruled that Frazier's orders could not be "collaterally attacked." On August 24, 1993, Rosenbaum filed a second Motion for Discretionary Review for Minix which was again denied by Chief Justice Stephens.

On May 31, 1994, Minix's attorney Phillip McKenzie, Esq. filed a Johnson Circuit Court motion requesting Frazier to declare his own orders void. Frazier did not respond and Minix, on November 29, 1994, filed his first *Pro Se* mandamus proceeding pursuant to Kentucky Civil Rules (CR) 76.36. Frazier admitted his disqualification. Wolf's new counsel, the respondents Leslie and McBrayer Law Firm, failed to respond. The Court of Appeals issued the writ on January 19, 1995 ruling that Frazier had no right to return to the bench. App. H, p. 59a. Frazier's special judge appointments and orders were ruled void *ab initio* of his first disqualification because he was "expressly prohibited" the assignment of a special judge pursuant to the Regional Administration Program Charter at IV.5, and "expressly prohibited" to return to the bench under Kentucky case law in *Wade v. Gondurant*, Ky., 625 S.W.2d 847 (1981) and *Wedding v. Lair*, Ky., 404 S.W.2d 451 (1966). Id. Chief Justice Stephens appointed Charles E. Lowe, Jr. as special judge.

Second Abuse of Process

Minix contended below that Leslie and McBrayer began to circumvent the writ to avoid the exposure of failing to respond to Minix's petition of the writ. On February 3, 1995, Leslie and McBrayer unsuccessfully requested the Court of Appeals to suspend the writ's effectiveness, wherein Leslie recognized that "if all of judge Frazier's orders are vacated, then the only valid orders concerning custody . . . were entered by Judge Hon. James A. Knight . . ."

When the writ was returned to Johnson Circuit Court, McKenzie for Minix requested Lowe to return the property and children under the orders of Judges Knight and Manual. (10) On March 19, 1995, Leslie and McBrayer filed a response requesting Lowe not to return the children pending their appeal of the writ to the Kentucky

Supremė Court. (11) On May 25, 1995, Special Judge Lowe sustained the motion.

On August 25, 1995, the Kentucky Supreme Court affirmed the writ. App. I, p. 61a. Stephen R. McGinnis, a McBrayer law firm partner, recognized in his Appellant's Brief that if "the order [writ] stands, the only valid orders [concerning custody] are, presumably, those of Judge Knight in 1988. . ."

McKenzie filed Minix's first Petition for Writ of Certiorari which was denied in *Marcus S. Minix v. Stephen N. Frazier*, 118 U.S. 1006 (1996).

On August 26, 1995, the opinion affirming the writ was returned to the Johnson Circuit Court wherein McKenzie immediately filed a *writ of habeas corpus* for Minix, requesting Lowe to return the property and children. On September 6, 1995, (11) Leslie and McBrayer tendered to Lowe a proposed decision which Minix characterized below as "a clever scheme to circumvent rulings, [which] induced the misapplication or perversion of rulings over the next seven years in six judicial proceedings." The record shows that the tendered decision of Leslie and McBrayer was based on their proposed findings that the writ not only ruled Frazier's orders a nullity, but also those orders of Knight, for the conclusion of law purpose that the children were not required to be returned.

On December 18, 1995, Judge Lowe (12) mechanically adopted such proposed decision as his own order. Minix referred to this decision below as "perverted" because it corrupted the writ's ruling. McKenzie, Esq. again unsuccessfully filed direct appeal and Motion for Discretionary Review for Minix.

McKenzie filed a second Petition for Writ of Certiorari for Minix which was denied in *Minix v. Kentucky, et. al.*, 110 S.C. 804 (Jan. 11, 1999).

District Court Proceedings

On January 24, 2000, Minix, filed his first *Pro Se* civil rights claim in the Federal District Court seeking to recover the value of his

property, children and money that he lost pursuant to Frazier's null orders. The District Court *sua sponte* dismissed his complaint as 13 days past Kentucky's one year of statute of limitations when measured from Minix's last denial of writ of certiorari. Minix appealed and the Sixth Circuit Court of Appeals on February 6, 2001 ruled in part that his claims were premature:

> **"Minix's argument also fails because the alleged availability of additional remedies indicates that his procedural due process claims are still premature. See *Zinermon v. Burch*, 494 U.S. 113, 126 (1990)." [Underline added.] App. B, p. 9a - 10a.**

On August 31, 2001, Minix, *Pro Se*, filed his additional remedies as a second mandamus action requesting the Kentucky Court of Appeals to direct the Johnson Circuit Court to return the children under the orders of Judges Knight and Manual, and to hold Lowe, Leslie and McBrayer in contempt for perverting the 1995 writ.

On September 14, 2001, Leslie and McBrayer responded and denied tendering any order to Lowe. On October 15, 2001, the Kentucky Court of Appeals denied Minix's second petition for writ of mandamus.

Minix, *Pro Se*, appealed to the Kentucky Supreme Court on the grounds that the Court of Appeals abused its discretion by ruling that there had been a "decision" on property and children's relocation, without making a finding of such Johnson Circuit Court decision. (16) On May 1, 2002, Leslie and McBrayer filed a response brief urging denial of Minix's second writ request. On August 22, 2002, the Kentucky Supreme Court denied Minix's request for second writ.

On April 10, 2003, Minix filed his *sub judice* second complaint in the District Court below, wherein he sought to recover the value of his property, children and money that he lost pursuant to Frazier's null orders.

THE DECISION BELOW

On July 2, 2003, respondents Leslie and the McBrayer Law Firm

filed a Motion for Summary Judgment claiming that there had been a valid "decision" granting property settlement and children's relocation. App. I, p. 64a. On August 15, 2003, Minix filed his response claiming that in violation of F.R.C.P. 56(c), Leslie and McBrayer failed to supply any support for their motion. See Argument II, below.

On October 9, 2003, the District Court granted the Motion for Summary Judgment filed by respondents Leslie and McBrayer, without holding a hearing. App. B, p. 4a. Minix, by response on August 15, 2003 and by Motion for Reconsideration on October 21, 2003, pointed out that the respondents' Motion for Summary Judgment was defective because it did not point to any evidence of a Johnson Circuit Court "decision" on these issues.

On December 15, 2003, the District Court overruled Minix's Motion for Reconsideration without making a finding of any Johnson Circuit Court "decision," App. D, p. 21a and charged Minix over $12,000 in opposing attorney fees. App. E, p. 28a; App. F, p. 40a; App. G, p. 52a.

On appeal, the Sixth Circuit Court of Appeals on December 3, 2004, affirmed the District Court and ruled that "Minix unilateral filing of a petition for a meritless alias writ of mandamus that attempts to relitigate already decided issues is not sufficient to support a finding of a continuing violation." App. A, p. 1a.

In his Petition for Rehearing and Suggestion of Rehearing *En Banc*, Minix again pointed out the defect in the Motion for Summary Judgment and the lack of any evidence of a "decision" in the record to deny his claims that there had not been a "decision."

On February 28, 2005, the Sixth Circuit denied Minix Petition and Suggestion of Rehearing *En Banc*. App. C, p. 20a.

REASONS FOR GRANTING REVIEW

This is the first time to review a judge who, subsequent to disqualifying, appointed himself as his own special judge. In doing so, he reversed the trial court's decision in favor of a party to the

proceeding who it is well-known was the judge's wife's good friend and social sorority sister.

Thus, this is a case of a judge's abuse of power, wherein the attorneys having knowledge of the wrongs being done, neglected or refused to prevent that, which by reasonable diligence, they could have prevented as alluded to in § 1986.

By issuance of mandamus, the judge's special judge appointments and orders were ruled a nullity. App. H, p. 59a and I, p. 61a.

Petitioner contends that he *prima facie* proved that the State, through its State actors, egregiously deprived him of "life, liberty, or property" because the only "decision" in this record, or any record, which judicially grants property settlement and children's relocation is a nullity. Not even the State's Attorney General, the judge, nor the attorneys in the divorce can show this court a valid Johnson Circuit Court decision on these issues.

When the petitioner complained, the Federal Courts below charged him over $12,000 in opposing attorney fees in the face of a *prima facie* case! App. E, F, G

Thus, the decisions below have so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the district court, as to call for an exercise of the Court's supervisory power pursuant to Supreme Court Rules 10.1(a).

Petitioner contends that a disqualified judge may not reverse the decisions in his divorce. The Federal Courts below disregarded the Due Process Clause which was intended to prevent a State actor "from abusing [its] power, or employing it as an instrument of oppression," *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) and "Intended to secure the individual from the arbitrary exercise of the powers of government," *Daniels v. Williams*, 474 U.S. 327, 331 (1986), *Hurtado v. California*, 110 U.S. 516, 527 (1884) quoting *Bank of Columbia v. Okely*, 4 Wheat. 235, 244 (1819). In the majority of such cases, this Court has held that the failure to provide adequate process prior to inflicting the harm violates the Due Process Clause.

This Court recognizes that "By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the due Process Clause promotes fairness in such decisions," *Daniels*, supra, 474 U.S. at 331. When it is possible for a State to institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The Courts below disregarded this Court's rulings in *Cleveland Board of Education v. Loudermill* and *Kentucky Department Corrections et al v. Thompson et al.*, which require that the courts apply a two step process in reviewing a procedural due process claim which requires the petitioner to show: (1) that he possessed a constitutionally protected interest; and (2) that he was deprived of that interest without due process of law.

Through 42 U.S.C. § 1983, Congress sought "to give a remedy to a party deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Accordingly, Congress authorized suits to redress deprivations of civil rights by persons acting under color of any state statue, ordinance, regulation, custom, or usage. 42 U.S.C. § 1983. In this case, petitioner lost his property and children by the null decision of a disqualified judge, and thus without that procedural due process that is required by the Fourteenth Amendment. Protecting litigants from such erroneous deprivations is central to one of the State's primary missions in running a court - a fair and impartial judiciary.

The Courts below disregarded this Court's rulings in *Parrat-Hudson* and their progeny, which recognize the validity of invoking Section 1983 where there is no constitutionally adequate State tort remedy for the loss. Petitioner had no State tort remedy available to have his property and children returned because jurisdiction of these issues remained in the same authority, the Johnson Circuit Court, which through which its state actors, inflicted the harm complained of.

THEREFORE, Petitioner MARCUS S. MINIX, SR., *PRO SE*, requests this Court GRANT this Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. In the event that the Court does not deem full review necessary or warranted, the Petitioner suggests that this court GRANT this Petition for Writ of Certiorari with a Summary Disposition of vacating the Judgment, overruling the attorney fees, and remanding the case to the Court of Appeals for the Sixth Circuit to apply the two step process for examination of procedural due process claim under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

ARGUMENT

I.

A FEDERAL QUESTION IS RAISED IN STATE'S PROCEDURE TO APPOINT A SPECIAL TRIAL COURT JUDGE WHEN THE NEED AROSE DUE TO DISQUALIFICATION OF AVAILABLE ELECTED TRIAL COURT JUDGES.

Petitioner contends that the State, under the mandate of the due Process Clause, may not provide him a disqualified judge in his divorce proceeding. It is an important question of federal law whether State's appointment procedures violate the Due Process Clause, or require additional safeguards under the *Mathews* balancing test.

Kentucky has two courts; a circuit court having general jurisdiction and district court having limited jurisdiction. Ky. Const. § 109-112. Kentucky has 120 counties that are divided into 35 district/circuits comprising one or more counties[2]. The district/circuit in densely populated areas, such as Lexington and Louisville, comprise one county, Fayette and Jefferson, respectively, and each have more than twelve circuit and twelve district judges. It is unlikely that all judges in these two districts/circuits would disqualify in the same judicial proceeding. Therefore, there is little

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[2]A map of Kentucky counties occupying these circuits is shown at www.kycourts.net/Circuit/KYCircuitsMap.shtm.

need for the appointment of a special judge in densely populated areas of Kentucky.

However, the majority of counties in Kentucky are sparsely populated having only one or two judges in a district/circuit comprising one or more counties. Therefore, in sparsely populated areas, the need for the appointment of a special judge has always been a problem for the people in Kentucky. In the present case, the Johnson Circuit Court is in Johnson County, which is one of three counties that comprise the 24th Judicial Circuit having only two judges. When both of those elected judges, Knight and Frazier, voluntarily disqualified in the Minix divorce, the need arose for someone to appoint a special judge.

Prior to 1976, special judges under KRS 23.230, were selected by written agreement among the attorneys, and if they could not agree, the clerk would certify the facts to the Chief Justice of the Kentucky Court of Appeals (now the Kentucky Supreme Court). The obvious problems incurred can be found in many cases such as *Sidell v. Hill*, 357 S.W.2d 318 (Ky. App. 1962) and *Wedding v. Lair*, 404 S.W.2d 451 (Ky. App. 1966).

Effective 1976, the people thought they had solved the problem by amending the Kentucky Constitution. The people specifically gave the General Assembly the exclusive power to determine the subject matter jurisdiction of the State's district and circuit courts. Ky. Const. §§ 112(3) and 113(3). The only exception to this exclusive power is contained in the adoption of § 110(5)(b), wherein the people, effective 1976, assigned the special judge appointing function to the Chief Justice:

> The Chief Justice of the Commonwealth shall be the executive head of the Court of Justice and he shall appoint such administrative assistants as deem necessary. He shall assign temporarily any justice or judge of the Commonwealth, active or retired, to sit in any court other than the Supreme Court when he deems such assignment necessary for the prompt disposition of causes. The Chief Justice shall submit the budget for the Court of Justice and perform all other necessary administrative

functions relating to the court.

Ky. Const. § 110(5)(b), effective 1976.

The people chose the Chief Justice as a safeguard to determine the disqualification grounds of a judge and to appoint a special judge. Obviously, the Chief Justice is far removed from trial court proceedings, would not be influenced by the facts or the parties, and has been selected by his peers as head of the state court judiciary.

After the Constitutional amendment was adopted, the Kentucky General Assembly passed two statutory mandates, enacted in 1976, intended to supplement the newly enacted amendment. See *Kentucky Utilities Co. v. South East Coal Co.*, 836 S.W.2d 407 (Ky. 1992). The first, KRS 26A.020, established the procedure by which the clerk of the court was to certify to the Chief Justice the facts regarding a judge's vacancy in office, or a party's affidavit of prejudice. *Nichols v. Commonwealth, Ky.*, 839 S.W.2d 263 (1992). The second, KRS 26A.015(3)(a) specifies: that "Any Justice or Judge of the Court of Justice disqualified under the provisions of this section shall be replaced by the Chief Justice."

Subsequently on December 5, 1977, the record below indicates that the Honorable John Palmore, then Chief Justice, instituted the Regional Administration Program Charter wherein he purported to delegate his special judge appointing function to two judges in both the district and circuit court in each of eight regions of the state. App. L, p. 72a He entitled these judges "chief regional" and "vice-chief regional judges."

On December 1, 1983, the Hon. Robert Stephens, then Chief Justice, adopted such Regional Administration Program Charter and appointed Frazier as chief regional circuit judge of the mountain region of Kentucky. This region contains the Johnson Circuit Court in which Minix filed divorce.

When the need arose for a special judge in Minix's divorce, Frazier claimed authority to assign a special judge, and assigned himself. There is no indication that the Chief Justice determined Frazier's grounds of disqualification, knew the need for a special judge

appointment, or knew that a disqualified judge had appointed himself.

Mathews Balancing Test

The adequacy of established procedures in *Mathews v. Eldridge*, 424 U.S. 319 (1976) involved a due process challenge to the administrative procedures for the purpose of terminating Social Security disability benefits. Therein, the *Mathews* balancing test was first conceived to address due process claims arising in the context of modern administrative law. The test determines what procedural safeguards are actually due under the disputed procedure, when a protectable liberty or property interest is at stake.

The three prong test found in *Mathews*, considers the various interests at stake in a challenged procedure, Id. at 335, as follows:

1. What private interest will be affected by the procedure (the Regional Administration Program Charter)?

All of a litigant's private interest will be affected because the court remains the same regardless in a change in the person of the judge. In the present case, Frazier's self-appointment resulted in a substantial and egregious deprivation of Minix's "life, liberty and property." Therefore, the risk of this kind of error must be minimized to the greatest extent feasible in light of possible procedural safeguards.

2. What is the risk of error (under the Regional Administration Program Charter), and the probable value of any additional or substitute procedural safeguards?

The procedure for the appointment of a special judge is no less important than the process for the election of a judge. The present case reveals that the Clause imposes limits on the partisanship of those who either appoint or become special judges, wherein one party may be favored over the detriment of the other.

The State, under the mandate of the Due Process Clause, may not provide the petitioner with a disqualified judge in his divorce proceeding. The People did not authorize the chief justice to delegate his special judge assigning function which can only be exercised

under the authority granted by the People. It is reasonable to assume that the Chief Justice would not have appointed a disqualified judge to the Minix divorce.

Additional Safeguards

If delegation passes muster, then additional safeguards are warranted. Because the Charter permits unbridled, absolute and unlimited power to a chief regional judge, at minimum the Chief Justice must be required to review and authorize in writing the special judge appointment. For example, in *Huntzinger v. McCrae*, Ky., App., 818 S.W.2d 416 (1997), the Chief Justice did not know that Frazier violated the Charter by appointing a special judge from outside the mountain region. In *Jacobs v. Commonwealth of Kentucky*, Ky. App., 947 S.W.2d 416 (1997), the Chief Justice did not know that Frazier improperly assigned a retired judge in violation of the Chief Justice's revocation of a portion of the Charter. It is not adequate that the Charter takes the Chief Justice completely out of the special judge assigning function.

Additionally, the Charter's attempt to prohibit a chief regional judge from appointing a special judge to a case from which he is disqualified through § IV.5, is not adequate. The particular union here is of administrative and judicial functions. It provided Frazier with the "possible temptation to the average man as judge," *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), to assign himself as special judge to aid and benefit his wife's good friend and social sorority sister (Wolf), a party to the proceeding, whereby he was able "to forget the burden of proof required to," Id., reverse the orders in the divorce, and it "lead" him "not to hold the balance nice, clear and true between the State and," Id., the divorcing parties. The union here violates *Tumey's* "temptation" test and can be eliminated by assigning someone other than trial judges to assist in the special judge appointing process.

Elimination of the Need for Special Judges

The problem is that there are not enough judges in a district/circuit. The problem can be eliminated by increasing the number of judges, for example, to no less than four in each district/circuit by

combining small districts/circuits. For example, combine the two judges in the 24th region of Johnson, Martin and Floyd Counties with the two judges in the adjacent 31st region of Floyd County.

3. What is the Government's interest, and the resulting administrative and fiscal burdens?

The rules of privacy restrict the State's interest in a litigant's "life, liberty and property." There should be little burden placed upon the State to provide these additional or substitute safeguards when weighing against the deprivation of the People's procedural right to a fair and impartial administrator to appoint a qualified special judge.

The State has significant interest assuring that qualified officers are appointing qualified special judges, such that justice is not interrupted by arbitrary or unnecessary action.

In weighing these balancing factors, the Court ultimately decides what process is actually due in the disputed procedure. *Parham v. J.R.*, 442 U.S. 584, 599 (1979).

II.

PRIMA FACIE EVIDENCE PROVED THAT STATE TRIAL COURT ISSUES RESULTED IN THE NULLITIES OF A DISQUALIFIED JUDGE, AND FEDERAL COURT'S DENIAL OF PETITIONER'S PROCEDURAL DUE PROCESS CLAIMS AND ORDERING PETITIONER TO PAY OVER $12,000 IN OPPOSING ATTORNEY FEES INVOKES COURTS' SUPERVISORY POWER UNDER SUPREME COURT RULES 10.1(A)

Broadly, Minix contends that he *prima facie* brought his claims of deprivation of "life, liberty and property" without due process of law, because the only decision granting property settlement and children's relocation in this record is the null one of a disqualified judge on May 18, 1990.

However, on July 2, 2003, respondents Leslie and the McBrayer Law Firm, as grounds for their Motion for Summary Judgment, made the unfounded contention that there had been a valid judicial

"decision" on these issues as follows:

> Minix' daughters being taken from him and property settlement . . . have been decided more than a year ago by the courts and appellant's claims are ridiculous and have absolutely no truth to them. App. J, p. 64a.

This Court holds that in a Motion for Summary Judgment, the moving party bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-24 (1986) citing Fed.R.Civ.P. 56(c).

Additionally, this Court recognizes that there is no need to decide whether the moving party has satisfied its ultimate burden of persuasion, unless and until the court finds that the moving party has discharged its initial burden of production. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-161 (1970); 1963 Advisory Committee's Notes on Fed. Rule Civ. Proc. 56(e), 28 U.S.C. App., p. 626.

In short, Minix contends that this Motion for Summary Judgment as shown in Appendix J, is defective on its face under F.R.C.P. Rule 56(c), because Leslie and McBrayer not only failed to identify anything in the record to "determine the absence of a genuine issue of material fact," but they also failed to file anything in the record such as "depositions, answers to interrogatories. . . admission . . [or] affidavits," that could be used to make such demonstration. Additionally, their Motion for Summary Judgment did not contain a Statement of Material Facts or Memorandum of Points and Authorities. Moreover, they are the only respondents to make such unfounded contention that there had been such a "decision." Not even the attorney general, the judge, nor any other attorneys in the proceeding have made that contention.

The burden to negate the claimed basis for the suit was that of the respondents, not that of Minix. Summary Judgment was

inappropriate because Leslie and McBrayer failed their "initial responsibility of informing the district court of the basis for its motion . . . which it believes demonstrate the absence of a genuine issue of material fact." *Celotex* at 323-24. Minix claim of deprivation of a "decision" is *prima facie*.

When Minix complained of losing his property and children pursuant to null orders of the state, the Federal District Court punished him by granting attorney fees to the respondents amounting to over $12,000, finding that Minix's "filing of the petition for an alias writ of mandamus was a contrived and ineffective action designed to revive the statute of limitations."

In order to be guilty of truly egregious misconduct, a plaintiff's claim must be found to have been "frivolous, unreasonable, or groundless." *Morrison v. Lipscomb*, 877 F.2d 463, 468-469 (6th Cir. 1989). In light of Minix's constitutional loss, and his timely filing of his *sub judice* complaint, Minix requests this court recognize that his claims were actionable and invoke Rule 10.1(a).

III.

PETITIONER INVOKED § 1983 BECAUSE HE HAD NO SEPARATE STATE TORT REMEDY TO RESTORE THE LOSS OF HIS PROPERTY AND CHILDREN THAT HE SUFFERED UNDER NULLITIES OF A DISQUALIFIED JUDGE.

Minix contends that he has *prima facie* proven that the State deprived him of "life, liberty and property" without due process of law, because the only evidence of a decision in this record which granted property settlement and relocation of his children away from him was that of Frazier on May 18, 1990, and it is conceded that it was ruled a nullity by issuance of mandamus in 1995.

This court has repeatedly noted that 42 U.S.C. § 1983 creates a "species of tort liability" in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305 (1986) citing *Carey v. Piphus*, 435 U.S. 247, 253 (1978), quoting *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

The *Parratt/Hudson* doctrine dictates that unauthorized deprivation of a plaintiff's property does not result in a violation of procedural due process rights if the state provides an adequate post-deprivation tort remedy. *Parratt v. Taylor,* 451 U.S. 527 (1981); *Hudson v. Palmer,* 468 U.S. 517 (1984). In the present case, there was no separate trial court tort-claim remedy available by which Minix was able to recover the loss of his property and children, because jurisdiction of these issues remained in the same authority, the Johnson Circuit Court, which through its state actors, inflicted the harm complained of.

Violations of procedural due process rights are not complete when the deprivation occurs; they are not complete "unless and until the State fails to provide due process." *Zinermon,* supra 494 U.S. at 126. Unlike violations of substantive rights, the existence of post deprivation remedies are relevant in a procedural due process claim. Id.[3]

The State failed to provide due process. The denial by the Kentucky Supreme Court on August 22, 2002, of Minix's second mandamus action, left him in the same position as if Frazier's null ordes were valid, and as if the orders of Judges Knight and Manual never existed.

On April 10, 2003, Minix timely filed the *sub judice* complaint well-within Kentucky's one year statute limitations. The Courts below failed to follow this Court's two step process for examination of procedural due process claims requiring the petitioner to show: (1) that he possessed a constitutionally protected interest; and (2) that he was deprived of that interest without due process of law.

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[3]In construing this principle, the Eleventh Circuit Court of Appeals explained that when a plaintiff has "suffered a procedural deprivation at the hands of [the State], he has not suffered a violation of his procedural due process rights unless and until the state... refuses to make available a means to remedy the deprivation." *McKinney v. Pate,* 20 F. 3d 1550, 1557 (11th Cir. 1994) (En Banc), cert. denied, 115 S. Ct. 898 (1995). See also *Batra v. Board of Regents of Univ. of Neb.,* 79 F. 3d 717, 720 (8th Cir. 1996).

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).[4]

Constitutionally Protected Interest

Minix claimed a protected liberty interest in the custody of his two children born of the marriage between he and Wolf, see e.g. *May v. Anderson*, 345 U.S. 528, 522 (1952), in his property, see e.g. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) and the valid decision of Judges Knight and Manual.

Deprivation of Protected Interests Without Due Process of Law

In his complaint, Minix brought seventeen (17) claims briefly set forth below.[5]

He claimed that he was deprived of: (1) his "right to physical custody of children which cannot be terminated without due process of law," *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985); (2) his right to property, e.g. *Goss v. Lopez*, 419 U.S. 565, 579 (1975); (3) his right to the enforcement of the valid orders of Judges Knight and Manual; (4) his right against "governmental power from being used for purposes or oppression," *Daniels v. Williams*, 474 U.S. 327, 331-332 (1986) (citations omitted); (5) his right to a "trial before an unbiased judge" which is essential to due process, *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); (6) his right to be heard "before the State deprived" him of "liberty, or property," *Zinermon v. Burch*, 494 at 127 (1990) citing *Cleveland, supra* at 542.

(7) His right to present a claim and have it adjudicated, e.g. *Logan v. Zimmerman Brush Co.*, 455 U.S 422, 429-430 (1982); (8) his right

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[4]See also *Kentucky Department Corrections et al v. Thompson et al.*, 490 U.S. 454, 460 (1989), where this court recited this same two step process citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972) and *Hewitt v. Helms*, 459 U.S. 460, 472 (1983).

[5]*Pro Se* complaints are held to less rigorous standards than formal pleadings drafted by lawyers and can be dismissed for failure to state a claim only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his clam that would entitle him to relief. *Haines v. Kerner*, 404 U.S. 5195 (1972), reh'g denied, 405 U.S. 948 (1972).

to parenting in the "care, custody and control" of his children, *Santosky v. Kramer*, 455 U.S. 745 (1982); (9) his right to privacy under e.g. *Moore v. East Cleveland*, 432 U.S. 494 (1977), concerning his children's custody and living arrangements; (10) his right to equal protection against arbitrary or irrational State action, e.g. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-57 (1985); (11) his right against outrageous conduct, *Humana of Kentucky, Inc., v. Seitz*, 796 S.W.2d 1, 2-3 (Ky. 1990); (12) his right to meaningful "access to the courts in an action for divorce," *Boddie v. Connecticut*, 401 U.S. 371, 381 (1971); (13) right to enforcement of adjudication on the issue of the right to relocate the children which was decided in the negative by Judges Knight and Manual; (14) right against obstruction of justice through 42 U.S. C. § 1985(2), see e.g. *Copeland v. Northwestern Memorial Hosp.*, 964 Fed. Supp. 1225 (N.D. III. 1997).

(15) Respondents in violation of 42 U.S.C. § 1986, neglected or refused to prevent the participation and orders of a disqualified judge that by reasonable diligence could have been prevented. (16) Deprivation of procedural due process requires fundamentally fair procedures when weakening familial bonds, e.g. *Santosky v. Kramer*, 455 U.S. 745 (1982). (17) Depriving petitioner of substantive due process where "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon*, 494 U.S. at 125 (quoting *Daniels, supra* 474 at 331. (18) Deprivation of fundamental fairness, *Pinkerton v. Farr*, 220 S.E. 2d 682, 687 (W.Va. 1975).

Minix requests that this court recognize that there is legitimacy to invoke the private remedies in § 1983 for his loss of property and children without due process of law.

IV.

DISQUALIFIED JUDGE AND ATTORNEYS ARE LIABLE FOR PETITIONER'S LOSS OF LIBERTY AND PROPERTY UNDER § 1983, IN JUDICIAL CONSPIRACY.

The standard for proving a § 1983 civil conspiracy claim was set forth in *Hooks v. Hooks*, 771 F.2d 935 (6th cir. 1985). All of the elements are present: a single plan ("to unlawfully deprive plaintiff of the physical custody of his children and property without due process of law"); shared by conspirators ("to deprive Plaintiff of due process in his Kentucky divorce and child custody proceeding"); and by overt acts (specifically numbered in the statement of the case above) in furtherance of the conspiracy that caused injury (loss of property and children by nullities.)

FRAZIER LACKS IMMUNITY AS CHIEF REGIONAL CIRCUIT JUDGE. Frazier "subject[ed], or cause[d] Minix to be subjected . . to the deprivation," under §1983, by appointing himself and Wells as special judge and domestic relations commissioner, respectively, to enter orders in favor of Frazier's wife's friend and social sorority sister.

Judge Frazier was sued in his personal capacity for actions he took in violation of Minix's rights in two State functions. State "officers sued in their personal capacity come to court as individuals." *Hafer v. Melo*, 112 S. Ct. 358, 363 (1991).

In the first personal capacity Frazier violated his duty as appointed chief regional circuit judge, and in the second, he violated his duty as elected Johnson County Circuit Judge.

This Court holds that when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost. *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 351 ("when the want of jurisdiction is known to the judge, no excuse is permissible"); *Turner v. Raynes*, 611 F.2d 92, 95 (5th Cir. 1980). *Stump v. Sparkman*, 435 U.S. 349 (1978) is consistent with the view that "a clearly inordinate exercise of unconferred jurisdiction by a judge-one so crass as to establish that he embarked on it either knowingly or recklessly - subjects him to personal liability".

Stump's implication is that, had there been Indiana law expressly prohibiting the defendant judge from exercising jurisdiction over

sterilization petitions, a clear absence of jurisdiction would have been established.

The state imparted no immunity to Frazier as chief regional circuit judge because he acted in the face of the Charter which, at IV.5., expressly prohibited his authority to assign a special judge after his disqualification. His usurp of authority denied Minix's right to a fair and impartial administrator in the appointment of a special judge.

FRAZIER LACKS IMMUNITY AS JOHNSON CIRCUIT COURT JUDGE. As ruled by the 1995 writ, Frazier was "expressly prohibited" to return to the bench after disqualification pursuant to State case law in *Wade*, supra, and *Wedding*, supra, without an agreement among the parties and attorneys in writing waiving his reason for disqualification. Frazier was acting in the "clear absence of all jurisdiction" because he was deprived of jurisdiction by Kentucky case law. Additionally, Frazier's self appointment was nothing in law, because his self-appointment was a nullity.

Immunity simply will not extend to a non-judicial act or to one who violates his authority. The judge in *Harper v. Merckle*, 638 F. 2d 848 (5th Cir. 1980), cert. denied 454 U.S. 816 (1981) had no immunity for holding a contempt proceeding where controversy did not center around him, but around plaintiff's former wife who worked with the judge at the courthouse. The Minix divorce never judicially centered around Frazier, because he had disqualified. It centered around Frazier's wife's friend, Wolf.

Minix requests that Frazier be properly held responsible for the consequences.

WELLS LACKS IMMUNITY AS DOMESTIC RELATIONS COMMISSIONER. Wells "subject[ed] or cause[d] Minix to be subjected . . . to the deprivation", § 1983, by accepting the appointment by a disqualified judge as domestic relations commissioner, holding hearings, and making recommendations to a disqualified judge.

It is not a judicial act to accept the appointment from, or to make

recommendations to a disqualified judge. Having knowledge of the wrongs being done, Wells neglected or refused to prevent them which he by reasonable diligence could have prevented as alluded to in § 1986.

Minix requests this Court rule that Wells has no immunity.

ATTORNEYS PERRY, LESLIE AND THE MCBRAYER LAW FIRM LACK IMMUNITY. This court made it clear that private persons, jointly engaged with State officials in the challenged action, are acting 'under color' of law for purposes of Sec. 1983 actions. *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). Therefore, even if Frazier and Wells were granted immunity, the state did not impart immunity to attorneys Perry, Leslie, and the McBrayer Law Firm.

Accordingly, Minix requests this Court to rule that he has alleged facts that state claims for which relief can be granted.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,
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APPENDICES

APPENDIX A

Nos. 03-6378/04-5023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Filed December 3, 2004

Marcus S. Minix, Sr
Plaintiff - Appellant,

v.

Stephen N. Frazier; George Keith Wells; George Chad Perry; Phillip Bruce Leslie; Law Firm McBrayer, McGinnis, Leslie & Kirkland
Defendants - Appellees.

Before: DAUGHTREY, COOK, and FARRIS, *Circuit Judges.

In case No. 03-6378, Marcus S. Minix, Sr. appeals the dismissal of his civil rights claim filed pursuant to 42 U.S.C. § 1983. In case No. 04-5023, Minix appeals the district court's award of attorneys' fees to the defendants. These appeals have been consolidated for decision and have been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On January 24, 2000, Minix filed his first civil rights complaint against Kentucky Circuit Court Judge Stephen Frazier and Chad Perry, Minix's divorce attorney, alleging that his due process rights were violated during various stages of his divorce proceedings. Minix alleged that Judge Frazier violated state procedures by making rulings and appointments after he recused himself from the action and that Perry did not prevent Judge Frazier from entering unauthorized orders in the case. The district court dismissed Minix's complaint because if was filed outside of the applicable statute of limitations. This court affirmed that decision finding that all of Minix's

*The Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

claims accrued no later than January 11, 199, the date the Supreme Court denied certiorari to review his divorce proceedings.

Minix returned to state court and filed a document styled as an "Alias Writ of Mandamus" wherein Minix attempted to enforce a prior writ of mandamus which was granted in his divorce case. Minix argued that subsequent orders by the Kentucky courts did not reflect compliance with the order granting his writ of mandamus. The Kentucky Court of Appeals denied Minix's petition, stating that it had previously reviewed and disposed of the issues presented. The Kentucky Supreme Court affirmed.

Thereafter, Minix filed his second civil rights complaint against Stephen N. Frazier, George Chad Perry, George keith Wells (the Domestic Relations Commissioner), Phillip Bruch Leslie (Minix's ex-wife's attorney), and the law firm of McBrayer, McGinnis, Leslie and Kirkland. Minix claimed that the defendants were involved in a conspiracy to deprive him of several rights including his substantive and procedural due process rights. Minix requested injunctive relief, attorneys' fees, and no less than $100,000 in compensatory damages and $100,000 in punitive damages. The district court dismissed Minix's complaint finding that it was filed outside of the statute of limitations and subsequently, denied a motion for reconsideration. The defendants filed motions for attorneys' fees which were granted by the district court. Minix now appeals the district court's decision to dismiss his case and to grant attorneys' fees.

The district court correctly dismissed Minix's complaint for his failure to file within the statute of limitations. Kentucky's one year statute of limitations contained in Ky. Rev. Stat. Ann. § 413.140(1)(a) applies to civil right claims arising in Kentucky. *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 394 (6th Cir. 1999). Minix argues that, while this court determined that the claims in his first civil rights complaint were filed outside of the statute of limitations, his current due process claims stem from a continuing violation that ceased only when his alias writ of mandamus was denied on August 22, 2002, or on May 2, 2002, when defendant Leslie filed a response to the writ in

the Kentucky Supreme Court. However, Minix's unilateral filing of a petition for a meritless alias writ of mandamus that attempts to relitigate already decided issues is not sufficient to support a finding of a continuing violation. The, as this court determined in Minix's first civil rights case, the statute of limitations began to run at the latest on January 11, 1999, when Minix's divorce and custody proceedings became final. Because Minix filed his complaint more than one year after this date, his complaint was filed outside of the statute of limitations. Consequently, the district court did not err in dismissing Minix's case.

Minix also argues that the defendants should not have been awarded any attorneys' fees. This court does not disturb an award of attorneys' fees pursuant to 42 U.S.C. § 1988 unless we conclude that the court abused its discretion in awarding them. See *Hadix v. Johnson*, 65 F.3d 532, 534 (6th Cir. 1995). "In any action or proceeding to enforce a provision of section [] . . . 1983 . . . the court, in it discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . ." 42 U.S.C. § 1988(b). However, "[a] prevailing defendant should only recover upon a finding by the district court that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001) (internal quotation marks and citations omitted.)

In awarding attorneys' fees, the district court noted that Minix's filing of the petition for an alias writ of mandamus was a "contrived and ineffective action designed to revive the [expired] statute of limitations" in federal court. For these reasons, which are supported by the record, Minix's attempt to thwart the statute of limitations in this case by filing an alias writ of mandamus and then returning to federal court was unreasonable. Consequently, the district court did not abuse its discretion in awarding attorneys' fees.

For the foregoing reasons, the district court's orders are affirmed pursuant to Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 7:03-113-DCR
MEMORANDUM OPINION AND ORDER
Filed October 9, 2003

Marcus S. Minix, Sr.
Plaintiff

v.

Stephen N. Frazier, et al.
Defendants

This matter is before the Court for consideration of:

(i) the Motion to Dismiss filed by the Law Firm of McBrayer, McGinnis, Leslie and Kirkland and the Plaintiff's Response to this motion. [Record Nos. 35 & 44] Additional consideration is given to the Plaintiff's Notice of Conflict of Interest. [Record No. 38]

(ii) Defendant George Keith Wells' Motion to Dismiss for Failure to State a Claim and Memorandum in Support. [Record Nos. 41 & 42] Consideration is also given to the Plaintiff's Response and Memorandum in Support, as well as to Defendant Wells' Reply. [Record Nos. 63, 64 & 67]

(iii) the Motion to Dismiss and Memorandum in Support filed by Judge Stephen N. Frazier. [Record No. 33 & 34] Additionally, consideration is given to Judge Frazier's Motion for Leave to Correct Error [Record No. 36], the Plaintiff's Response and Memorandum in Support [Record Nos. 60 & 61], and Judge Frazier's Reply [Record No. 65]

(iv) Defendant George Chad Perry's Motion to Dismiss or for Summary Judgment and Memorandum in Support thereof. [Record Nos. 51 & 52] The Plaintiff's Response and supporting

Memorandum [Record No. 58 & 59] have also been considered, together with Perry's Supplement to his Motion to Dismiss or for Summary Judgment [Record No. 62] and the Plaintiff's Response thereto. [Record No. 66]

After considering all these matters, the Court finds that dismissal of the Plaintiff's claims is required on statute of limitations grounds.

Factual Background

In 1986, the Plaintiff filed for divorce from Sherry Minix and sought custody of their two minor daughters. The divorce action was filed in the Johnson Circuit Court. Defendant George Chad Perry represented Marcus Minix, the husband, in the divorce proceedings. The case was originally assigned to Stephen Frazier, Judge of the Johnson Circuit Court. Judge Frazier either recused or voluntarily disqualified himself due to a close personal relationship between his wife and the Plaintiff's wife.

Following Judge Frazier's recusal, the case was reassigned to Judge James A. Knight (now deceased). Beginning in October of 1987, Judge Knight entered orders including: (i) an order requiring the two Minix children to live in Paintsville under joint custody, and (ii) an order abating a property settlement pending the Plaintiff's May 5, 1988 bankruptcy petition. In January 1989, Judge Knight also recused after the wife obtained new counsel related to him.

On September 7, 1989, then acting Chief Regional Circuit Judge Stephen Frazier utilized powers granted to him pursuant to Kentucky's Regional Administration Program Charter to assign a third judge (Special Judge Manual) to the Minix divorce case. Special Judge Manual entered an order denying the wife's motion for sole custody and to relocate the two Minix children to Ashland, Kentucky. Thereafter, on December 28, 1989, Judge Frazier referred the Minix case to Defendant George Keith Wells, the Domestic Relations Commissioner for the Johnson Circuit Court.

Wells allegedly discussed the matter with Judge Frazier and, thereafter, gave the wife in the proceedings the right to appraise the

Plaintiff's assets. Those assets reportedly had become the property of the Plaintiff's bankruptcy estate. Wells also allegedly entered an order requiring the Plaintiff to pay Wells $600.

On February 15, 1990, Wells interviewed both Minix children. And in May of 1990, Wells made recommended findings of fact and conclusions of law. Wells' report recommended that Minix's former wife be granted a property settlement, sole custody of the children, permission to relocate away from the Plaintiff, a two-thirds reduction of the Plaintiff's child visitation time, and relief from any responsibility for transporting the children for the Plaintiff's visitation. Both parties filed objections to the recommendations.

It is further alleged that, in May of 1990, Judge Manual reasserted jurisdiction, granted the wife's previously-denied motion, made visitation arrangement decisions and, without having the bankruptcy stay lifted, directed the husband to pay a property settlement based upon property held by a bankruptcy trustee. For unknown reasons and at an unknown time, Judge Manual later left the case.

On May 28, 1990, Judge Frazier ordered the adoption of Domestic Relations Commissioner Wells' recommendations. Judge Frazier, again in his capacity as Chief Regional Circuit Judge, resumed participation n the case, again disqualified himself and on May 18, 1991, assigned Special Judge Asbury to the matter.

On May 31, 1994, Minix (now with new counsel) filed a motion for Judge Frazier to recognize his disqualification and for the orders of Special Judge Knight to be enforced. At approximately the same time, the wife began an adversary proceeding in the bankruptcy case to enforce the Judge Frazier - ordered property settlement. Allegedly, as a result, the husband's pre-marital home was auctioned, yielding insufficient proceeds to cover the mortgage and sale costs.

By Order of December 5, 1994, the Chief Justice of the Supreme Court of Kentucky Robert F. Stephens, having had the matter referred to him by Judge Frazier, appointed Special Judge Charles E. Lowe, Jr., to the Minix divorce case. On May 25, 1995, Judge Lowe granted the wife primary physical custody of the daughters.

On January 19, 1995, the Kentucky Court of Appeals determined that any order entered by Judge Frazier in the Minix divorce case, after Judge Frazier had resumed participation in the case, was null and void. The Court of Appeals directed Judge Lowe to enter an order vacating all orders and judgments entered by Judge Frazier subsequent to Judge Frazier's voluntary disqualification from the case. The Plaintiff complains that, following this order, Defendant Leslie and the law firm of McBrayer, McGinnis, Leslie and Kirkland, apparently acting on behalf of the wife, successfully asserted in three unspecified state courts that Judge Lowe's order, vacating all orders and judgments entered by Judge Frazier subsequent to Judge Frazier's voluntary disqualification from that case, acted to nullify Judge Frazier's orders appointing Judges Knight and Manual and therefore, all of the orders entered by either Judge Knight or Judge Manual were also null and void. The practical effect of this was that unspecified state courts determined that the wife could not be held in contempt of court for relocating the children out of Paintsville, because Judge Knight's order that the children reside in Paintsville under joint custody was a null and void order. The other practical effect of this was that Judge Manual's order denying the wife's request to relocate the children was null and void.

Minix filed two cases in the United States District Court for the Eastern District of Kentucky. First, Minix filed *In re M. Stephen Minix v. Sherry Minix, et al.,* Pikeville Civil Action No. 94-177 [hereinafter, "94-177"] pertaining to the bankruptcy proceeding. On September 30, 1996, the Sixth Circuit considered Judge Hood's decision that the bankruptcy court had not violated the automatic stay in Minix's bankruptcy proceeding. The Sixth Circuit panel succinctly opined:

> Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are not persuaded that the district court erred when it affirmed the bankruptcy court's conclusion that there was no evidence of a willful violation of the stay. Furthermore, the circumstances of this case warrant application of equitable principles to defeat Mr. Minix's claim.

M. Stephen Minix v. Sherry Minix, et al. 98 F.3d 1342, 1996 WL 557765 (6th Cir. (Ky.) Sept. 30, 1996) (Table)

Thereafter, on January 24, 2000, Minix filed a civil rights complaint styled: *Marcus S. Minix, Sr. v. Stephen N. Frazier and George Chad Perry*, Pikeville Civil Action No. 00-CV-32 [hereinafter, "00-32"]. In 00-32, Minix asserted the same set of facts as those alleged in the present action. He argued that the alleged actions constituted a violation of his due process rights. Because Minix was not proceeding *in forma pauperis* in 00-32, because he had paid the filing fee, and because it was apparent from the face of the complaint that the Plaintiff's claims were obviously barred by the statute of limitations, this Court, Judge Joseph Hood presiding, determined by memorandum Opinion and Order filed February 11, 2000, that *sua sponte* dismissal, without prejudice, was appropriate "subject to *Apple v. Glenn*, 183 F.3d 477 (6th Cir. 1999); *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir. 1983); and Federal Rule of Civil Procedure 59."

Subsequently, in 00-32 *pro se* Plaintiff filed a Fed.R.Civ.P. 59 motion for the court to alter or amend its February 11, 2000 Memorandum Opinion and Order dismissing the § 1983 action. By Order dated February 25, 2000, the Court considered the Plaintiff's contention that his action was not time-barred because, under *Zinermon v. Burch*, 494 U.S. 113 (1990), a Constitutional violation actionable under § 1983 is not complete until the state fails to provide due process and the court in the § 1983 action must examine all of a state's pre- and post- deprivation procedures.

The Plaintiff claimed that he had been denied both pre- and post-deprivation due process by the state and that the issue of whether the bankruptcy stay had been violated had never been examined. The Plaintiff sought for this court (Judge Hood presiding) to hear his claims. In the February 25, 2000 Order, Judge Hood determined that there was no basis in the Rule 59 motion upon which the Court should alter or amend its prior *sua sponte* dismissal of the action for being time-barred. The Court commented that "[t]he very last complained-of event, the Supreme Court's denial of *certiorari* in

Minix v. Kentucky, occurred on January 11, 1999. The instant action was not filed until more than a year later, on January 24, 2000 . . . [therefore,] the current complaint . . . is clearly barred by the applicable one-year statute of limitations."

The Plaintiff then appealed Judge Hood's ruling in Civil Action No. 00-32 to the Sixth Circuit Court of Appeals. The appeal was docketed as Case No. 00-5292. By opinion rendered February 6, 2001, the appellate court stated that:

> Marcus S. Minix Sr., appeals *pro se* from a district court judgment that dismissed his civil rights action filed under 42 U.S.C. §§ 1981 through 1988. His appeal has been referred to a panel of this court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, the panel unanimously agrees that oral argument is not needed in this case. *See* Fed.R.App.P. 34(a).
>
> Minix filed his complaint on January 24, 2000, alleging that the defendants violated his right to due process during his divorce and custody proceedings. He primarily alleged: 1) that a Kentucky judge had violated state procedure; and 2) that his attorney had not prevented the judge from doing so. The district court found that the complaint was untimely, and dismissed the case on February 14, 2000. Minix's motion for reconsideration was subsequently denied, and he now appeals.
>
> A one-year limitations period applies to civil rights action that arise in Kentucky. See Collard v. Kentucky Bd. of Nursing, 896 F.2d 179, 182 (6th Cir. 1990). Thus, Minix's claims must have accrued within one year of the date on which his complaint was filed, or no earlier than January 24, 1999. It appears that Minix's current case was untimely because the complaint plainly indicates that all of his claims had accrued no later than January 11, 1999, when the Supreme Court denied an application for a writ of certiorari regarding his divorce. *See id.* at 183-84.
>
> Minix now argues that the limitations period has not begun on his due process claims, as he still has post-deprivation

remedies available to him in the state courts. However, the complaint expressly indicates that Minix had already exhausted his remedies. Minix's argument also fails because the alleged availability of additional remedies indicates that his procedural due process claims are still premature. See *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S. Ct. 975, 108 L.Ed.2d 100 (1990). If Minix's claims are not premature, then his case is untimely because the last proceeding described in the complaint occurred more than a year before the complaint was filed.

Minix asserts that rulings in his divorce case were made by special judges who had not been properly appointed under an unpublished administrative charter. However, "[p]rocess is not an end in itself." *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S. Ct. 1741, 75 L.Ed.2d 813 (1983). Thus, Minix's claims also fail because he does not have a constitutionally protected liberty interest in the procedural nuances of the state rules that he has alleged. *See id.* at 249-51, 103 S.C. 1741; *Levin v. Childers*, 101 F.3d 44, 46 (6th Cir. 1996).

Minix argues that the district court erred when it rejected his claim that the defendants had violated an automatic stay in his bankruptcy case. However, a prior panel of our court has already ruled that the defendants did not violate the stay, and that ruling is controlling in the present case. See *Phillip v. United States*, 229 F.3d 550, 552-53 (6th Cir. 2000).

Finally, Minix argues that the district court should have given him an opportunity to amend the complaint. However, a plaintiff need not be given an opportunity to amend before a patently meritless case is dismissed for lack of subject matter jurisdiction. See *McLaughlin v. Cotner*, 193 F.3d 410, 412 (6th Cir. 1999), cert. denied, 529 U.S. 1008, 120 S. Ct. 1278, 146 L.Ed.2d 226 (2000). Hence, Minix's argument fails because the allegations in his complaint clearly show that his civil rights action was time-barred. See *Collard*, 896 F.2d at 183-84.

Accordingly, the district court's judgment is affirmed. See Rule 34(j)(2)(C), Rules of the Sixth Circuit.

Marcus S. Minix v. Stephen N. Frazier; George Chad Perry, 4 Fed. Appx. 230, 2001 WL 128346 (6th Cir. (Ky.) Feb. 6, 2001) (Unpublished disposition).

The Plaintiff's Claims

On April 10, 2003, Marcus S. Minix, Sr. filed the present action for damages, declaratory and injunctive relief under the United States Constitution, 42 U.S.C. § 1983, 1985(2) and 1986. The Plaintiff's basic allegation is that the Defendants conspired to violate his procedural and substantive due process rights when they allegedly improperly deprived him of child custody and property without due process of law based upon the same factual allegations that have previously been set forth in this Memorandum Opinion and Order.

Defendants

The name Defendants are Judge Stephen N. Frazier, George Keith Wells, George Chad Perry, Phillip Bruce Leslie and the law firm of McBrayer, McGinnis, Leslie and Kirkland.

Statute of Limitations

Each of the name Defendants moves the court to dismiss the Plaintiff's complaint because it is barred by the statute of limitations. The Defendants assert that Judge Hood and the Sixth Circuit Court of Appeals have previously determined that January 11, 1999, is the accrual date for statute of limitations purposes of the claims asserted herein.

Though the Defendants, collectively, offer multiple legal theories upon which this complaint may be dismissed, the Court will address only the statute of limitations issues because it is dispositive and because this is the most efficient means of disposing of a matter that has already usurped far too many of this Court's resources. Should this case be subsequently remanded for further proceedings, at that time, the Court will allow the Defendants to renew their motions on the alternative grounds they have raised.

The Plaintiff's Position

The Plaintiff seeks to have this Court deny the Motions to Dismiss insofar as they are based upon a statute of limitations defense. The Plaintiff asserts that the complaint filed April 10, 2003, has been timely filed within the one-year statute of limitations because his cause of action did not accrue until August 22, 2002 - the date the Kentucky Supreme Court issued an unpublished opinion denying the Plaintiff's petition for alias writ of mandamus. The Plaintiff, in essence, asserts that the Sixth Circuit Court of Appeals opinion of February 6, 2001 in Marcus S. Minix v. Stephen N. Frazier; George Chad Perry, 4 Fed.Appx. 230, 2001 WL 128346 (6th Cir. (Ky.) Feb. 6, 2001) (unpublished disposition) did not hold that his claims were barred by the statute of limitations. Instead, he asserts that it merely held that the Plaintiff's due process-based §§ 1981-1988 claims were not ripe and, therefore, were not properly before the federal court at that time because additional state court remedies were still available to the Plaintiff.

The Plaintiff asserts that he attempted to exhaust his state remedies by filing a petition for an alias writ of mandamus in a Kentucky appellate court, but that petition was denied on August 22, 2002. Therefore, he asserts that his current complaint was timely filed on April 10, 2003. The Plaintiff also alleges that by his filing a petition for an alias writ of mandamus he was subject to a continuing violation of his due process rights, which lengthened the accrual date of the statute of limitations for this §§§ 1983, 1985(2) and 1986 action until August 22, 2002. On that date, the Kentucky Supreme Court rejected his petition for an alias writ of mandamus regarding the alleged deprivation of his due process rights within Kentucky's lower state courts. The Plaintiff claims that his action under 42 U.S.C. §§§ 1983, 1985(2) and 1986 did not accrue until August 22, 2002. Therefore, he argues that his current case was timely filed on April 10, 2003, within the one-year statute of limitations. In essence, the Plaintiff claims that because his petition for an alias writ of mandamus was denied by the Kentucky Supreme Court on August 22, 2002, that action subjected him to yet another in a long series of

allegedly wrongful acts for which the statute of limitations in this action should be constantly re-accruing.

The Plaintiff further asserts that, even if the denial of the petition for alias writ of mandamus did not mark the beginning of the running of the statute of limitations, his allegation that on May 2, 2002, Defendant Leslie filed a response in the Kentucky Supreme Court in furtherance of the single plan to deprive him of his constitutional right to due process is sufficient to bring the presently asserted claims within the one-year statute of limitations.

The Defendants' Position

The Defendants contend that the issue of the statute of limitations regarding the Plaintiff's present claims has been previously established by Judge Hood in case #00-32 when the Court determined that the statute of limitations had expired and that the accrual date for the statue of limitations on the currently-asserted claims (or similar claims based upon the same facts) was January 11, 1999. The Defendants contend that Judge Hood's statute of limitations decision was affirmed by the opinion of the Sixth Circuit Court of Appeals rendered February 6, 2001, in *Marcus S. Minix v. Stephen N. Frazier; George Chad Perry*, 4 Fed. Appx. 230, 2001 WL 128346 (6th Cir. (Ky.) (unpublished disposition).

The Defendants also assert that the Plaintiff's petition for an alias writ of mandamus did not constitute further exhaustion of the Plaintiff's state court remedies so as to reset the accrual date for the statute of limitations in the present action to August 22, 2002. The Defendants claim that neither the Plaintiff's petition for an alias writ of mandamus nor Defendants Leslie's response constitutes a continuing violation and neither affords a basis upon which to reset the accrual date for the statue of limitations in the current action to August 22, 2002 or May 2, 2002, respectively. In summary, the Defendants argue that this action is time-barred and therefore, should be dismissed.

The Statute of Limitations Issue

Federal law governs when the statue of limitations period begins

to run or accrues. Seview v. Turner, 742 F.2d 262, 272 (6th Cir. 1984). The statute of limitations commences to run when the Plaintiff knows or has reason to know of the injury which is the basis of his action. Id. at 273.

For all 42 U.S.C. §§ 1981, 1983 and 1985 actions, federal courts apply the state personal injury statute of limitations. *Moore v. Potter*, 47 Fed.Appx. 318, 2002 WL 31096673 (6th Cir. (Tenn.) Sept. 18, 2002) (citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62, 107 S. Ct. 2617, 96 L.Ed.2d 572 (1987) (§1981); *Wilson v. Garcia*, 471 U.S. 261, 280, 105 S. Ct. 1938, 85 L.Ed.2s 254 (1985) (§1983); *Savage v. Unknown FBI Agents*, No 97-331, 1998 WL 69318, at *1 (6th Cir. Feb. 10, 1998) (unpublished order) (§1985). The statute of limitations for § 1986 actions is one year. Moore v. Potter, 47 Fed. Appx. 318, 2002 WL 31096673 (6th Cir. (Tenn.) Sept. 18, 2002) (citing See 42 U.S.C. § 1986). Likewise, the statute of limitations for any 42 U.S.C. §1983 action rising in Kentucky is one year. *Collard v. Kentucky Board of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990). Consequently, a one-year statute of limitations is applicable to all the Plaintiff's claims.

The Plaintiff's complaint was filed on April 10, 2003. Therefore, the Plaintiff's cause of action must have accrued on or after April 10, 2002. However, none of the Defendants' complained of actions occurred on or after April 10, 2002. Thus, the Plaintiff has filed all of his claims outside of the statute of limitations.

Petition for Alias Writ of Mandamus was not mandated by prior Sixth Circuit Opinion

The Plaintiff's petition for an alias writ of mandamus filed in a Kentucky court did not extend the accrual date for the statute of limitations. The February 6, 2001, Order of the Sixth Circuit Court of Appeals offers no support for the Plaintiff's position that the present action is not filed outside of the statute of limitations. Case #00-32, which was essentially the same case as the case at bar, was dismissed on statue of limitations grounds by Judge Hood and the Sixth Circuit. The Sixth Circuit's February 6, 2001 opinion did not require Minix to file a petition for alias writ of mandamus, or any other

pleading, to finally exhaust his state court remedies. Instead, the February 6, 2001 opinion confirmed Minix's allegation that his state court remedies had been fully exhausted prior to his having filed Case #00-32, so he may not now belatedly retract that statement or act inconsistently with it.

The August 22, 2002 decision on Minix's petition for an alias writ of mandamus did not re-set the accrual date for the statute of limitations for the herein considered claims. A reading of Judge Hood's memorandum Opinion and Order in Civil Action No. 00-32 and of the full February 6, 2001, Sixth Circuit opinion and Order in Civil Action No. 00-32 and of the full February 6, 2001, Sixth Circuit opinion establishes that Minix's interpretation is incorrect. Minix cannot rely on the "not ripe" language because it was only dictum. The actual holding in the February 6, 2001, Order was to affirm this Court's ruling that the statute of limitations had expired and the claims were then (and still are) time-barred.

The Plaintiff's filing of the petition for an alias writ of mandamus was a contrived and ineffective action designed to revive the statue of limitations for the present claims. Minix's interpretation of the Sixth Circuit's language is implausible, not credible, and factually baseless. The Kentucky Supreme Court established that Minix's petition for an alias writ of mandamus was not an available state court remedy by that court's rejection of Minix's petition. That rejection establishes that the controlling date for the accrual of the statute of limitations in this case is January 11, 1999.

The Petition for an Alias Writ of Mandamus does not constitute a continuing violation

Minix appears to assert that his own filing of a petition for an alias writ of mandamus constituted an act of continuing violation by the Defendants for purposes of determining when the statute of limitations accrued for the current action. Obviously, it is illogical and inappropriate for Minix to claim that his own action was an act of continuing violation by the Defendants.

In *Tackett v. Marion County Fair Board, et al,* 272 F.Supp.2d 686,

690-91; 2003 WL 21710483 (N.D. Ohio) June 26, 2003, the court discussed the concept of continuing violations for purposes of determining when the statute of limitations accrues in a civil rights action. The court noted that the Sixth Circuit has distinguished a continuing violation from the continuing effect of a prior violation and has said that the statute of limitations accrues in response to a discriminatory act, not in response to the continuing ill effects of past acts. Id. at 690 (citing *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 858 (6th Cir. 2003)).

There are two kinds of continuing violations: 1) when there is evidence of present constitutionally impermissible activity, and 2) when there is a long-standing and demonstrable policy of constitutionally impermissible activity. Tackett at 691 (city *Dixon v. Anderson*, 928 F.2d 212, 217 (6th Cir. 1991)). Thus, for the Plaintiff's self-effectuated state court petition for an alias writ of mandamus to have constituted a continuing violation for the purpose of determining when the statute of limitations accrued, the filing of that petition must have constituted evidence of present wrongful activity of the Defendants or evidence of a long-standing and demonstrable policy of wrongful activity which is perpetuated by the Defendant. Therefore, an examination of the nature of a petition for an alias writ of mandamus is in order.

A petition for an alias writ of mandamus is, in and of itself, not a new matter. Therefore, it cannot spawn evidence of a new wrongful activity or evidence of the Defendants' perpetuation of a policy of wrongful activity. "An 'alias writ of mandamus' is a duplicate of the original and a substitute therefore, being issued when the original writ of the same kind has been issued without effect and command of alias writ should be the same as the original." *State of Nebraska, et al. v. McFarland*, 166 Neb. 242, 88 N.W.2d 892 (1958). Consequently, a properly characterized petition for an alia writ of mandamus is designed to give a petitioner a second opportunity to force someone to do that which they have already been ordered to do. *See Id.* It is a duplication of a prior action. It does not present a new wrongful act and it is not indicative of a Defendant's discriminatory policy. It is merely a procedural tool.

The denial of this petition for an alias writ of mandamus does not cause a previously-established accrual of the statute of limitations to change to a later date. It is not a continuing violation of the type which resets the accrual date. Consequently, the Plaintiff's allegation that his statute of limitations accrued on August 22, 2002, is not well-taken.

Not all appellate challenges to a lower court's ruling amount to continuing violations that are sufficient to toll the statute of limitations period in which a potential § 1983 Plaintiff may timely bring the § 1983 claim. See *Trzebuckowski v. City of Cleveland*, 319 F.3d 853 (6th Cir. 2003) (A city's appeal of municipal court dismissal of criminal proceeding against § 1983 plaintiff did not amount to continuing violation sufficient to toll limitations period within which owner could assert § 1983 claim). When § 1983 claims are inextricably intertwined with a final state court judgment, the statute of limitations cannot be extended based upon an ongoing injury/ continuing-violation claim. *Mehdipur v. Chapel*, 12 Fed. Appx. 810, 2001 WL 468010 (10th Cir. (Okla.) 2001). Accordingly, the Plaintiff's post-final state court appellate decision petition for an alias writ of mandamus to the state appellate court could not provide sufficiently new activity to warrant a change in the accrual date of the Plaintiff's §§ 1983, 1985(2) and 1986 action.

Leslie's May 2, 2002 Filing Did Not Re-Set the Accrual Date for the Statute of Limitations

The Plaintiff claims in a vague way that on May 2, 2002, Defendant Leslie filed an unspecified "response" in an unspecified case before the Kentucky Supreme Court. Therefore, he asserts that his filing extended the accrual date for the statute of limitations. Courts are not required to accept non-specific factual allegations and inferences or unwarranted legal conclusions. See Dellis v. Corr. Corp. of Am., 257 F.3d 508, 511 (6th Cir. 2001). Moreover, the Plaintiff has filed to establish that any such responsive filing constituted a continuing violation of sufficient kind to extend the date upon which the statute of limitations accrued. The statue of limitations did not accrue on May 2, 2002, for the Plaintiff's purpose of filing this

action against Defendant Leslie or any of the other name Defendants.

In summary, the Plaintiff has filed his 42 U.S.C. § 1983 action against Leslie and the law firm of McBrayer, McGinnis, Leslie and Kirkland out of time, and the Motions to Dismiss [Record Nos. 35, 41, 33 and 51] of Defendants Leslie, the firm of McBrayer, McGinnis, Leslie and Kirkland, George Keith Wells, Judge Stephen N. Frazier, and George Chad Perry will be granted.

Plaintiff's Notice of Conflict of Interest

The Plaintiff has filed a pleading entitled "NOTICE OF CONFLICT OF INTEREST" [Record No. 38]. The Plaintiff states that he seeks for the Court to "determine any potential conflict of interest in this proceeding." Thereafter, the Plaintiff alleges that R. Stephen McGinnis, Esq., has a conflict of interest because he represents the law firm of McBrayer, McGinnis, Leslie and Kirkland and Bruce Leslie, while at the same time the Plaintiff considers McGinnis to be a material witness, and because McGinnis is a Defendant. Additionally, the Plaintiff considers all members, principals, partner or agents of the law firm to have conflicts of interest because he considers all of them to be material witnesses. Finally, the Plaintiff considers McGinnis to have a conflict of interest because he represents both Leslie and the law firm.

To the extent that the Defendants may or may not have conflicts of interest, that is their issue to pursue and not this Plaintiff's. He is without standing to bring these claims before the Court. To the extent that the Plaintiff thinks there are conflicts because of whom he intends to call a material witnesses, this issue is moot as his complaint will be dismissed on statute of limitations grounds.

Conclusion

Accordingly, it is hereby **ORDERED** as follows:

(1) The Motions to Dismiss of Defendant Leslie and the law firm of McBrayer, McGinnis, Leslie and Kirkland, Judge Stephen Frazier, George Keith Wells, and George Chad Perry, respectively [Record Nos. 35, 33, 41 and 51], are **GRANTED**.

(2) This action if **DISMISSED**, with prejudice.

(3) Judgment is hereby entered in favor of Defendant Leslie and the law firm of McBrayer, McGinnis, Leslie and Kirkland; Judge Stephen Frazier, George Keith Wells and George Chad Perry.

(4) The Plaintiff's Notice of Conflict [Record No. 38] is **DENIED** as moot.

(5) Judge Frazier's Motion for Leave to Correct Error [Record No. 36] is **GRANTED**.

(6) This a **FINAL** and **APPEALABLE** order.

(7) The Court certifies that any appeal would not be taken in good faith. 28 U.S.C. § 1915(a)(b); McGore v. Wrigglesworth, 114 F.3d 601, 610-11 (6th Cir. 1997); Kincade v. Sparkman, 117 F.3d 949 (6th Cir. 1997).

This 8th day October, 2003

s/Danny C. Reeves
United States District Judge

APPENDIX C

Nos. 03-6378/04-5023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Filed February 28, 2005

Marcus S. Minix, Sr.
Plaintiff - Appellant

v.

Stephen N. Frazier, et al.
Defendants - Appellees

BEFORE: DAUGHTREY, COOK and FARRIS, *Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
s/Leonard Green, Clerk

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*The Honorable Jerome Farris, Senior United States Circuit Judge for the Ninth Circuit of Appeals, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 7:03-113-DCR
MEMORANDUM OPINION AND ORDER
Filed December 15, 2003

Marcus S. Minix, Sr.
Plaintiff

v.

Stephen N. Frazier, et al.
Defendants

By Memorandum Opinion and Order dated October 9, 2003, this Court granted Defendants Leslie, the law firm of McBrayer, McGinnis, Leslie & Kirkland (hereafter, the "law firm"), Judge Stephen Frazier, George K. Wells and George Chad Perry's motions to dismiss this action with prejudice. In addition, the Court entered judgment in favor of these Defendants, denied the Plaintiff's Notice of Conflict and granted Defendant Frazier's Motion for Leave to Correct Error.

This matter is currently pending for consideration of the Plaintiff's Motion for Reconsideration, Findings of Fact and Conclusions of Law and to Alter or Amend Judgment [Record No. 70]; Defendant George Keith Wells' Response/Reply to Plaintiff's Motion for Reconsideration [Record No. 76]; and Plaintiff's Reply to Defendant Wells' Response/Reply [Record No. 70]. For the reasons discussed below, the relief requested by the Plaintiff will be denied.

The Motion For Reconsideration

Through his motion, the Plaintiff seeks relief from this Court's Memorandum Opinion and Order of October 9, 2003, in which this action was dismissed, with prejudice, on statute of limitations grounds.

The Plaintiff also seeks relief from this Court's Memorandum Opinion and Order of October 10, 2003, wherein the Court denied all remaining motions as moot. Plaintiff Minix's pleading is basically two-pronged. First, he tries to avoid the Court's prior ruling that his action was filed after the statute of limitations had expired. With respect to this issue, he asserts that the accrual date for the statute of limitation (insofar as it is measured with regard tot the actions of Defendants Leslie and the law firm) was May 2, 2002. Therefore, he argues that his claims against those Defendants were not filed out of time. Next, assuming the statue of limitations prohibition is resolved in his favor, Minix once again attempts to address the case on the merits.

A. The May 2, 2002, Accrual Date

The Plaintiff initially takes issue with the Court's determination that the Plaintiff's claims against Defendants Leslie and the law firm were filed outside the applicable one-year statute of limitations when he filed this case on April 10, 2003. Minix asserts that, because Defendant Leslie filed a Response before the Kentucky Supreme Court on May 2, 2002, the accrual date for the statute of limitations for his section 1983, 1985(2) and 1986 claims against Defendants Leslie and the law firm was May 2, 2002. Under this scenario, Minix asserts that his April 10, 2003, filing was within the one-year statute of limitations which, for purposes of these Defendants, allegedly accrued on May 2, 2002. With respect to the continuing violations sufficient to toll the statue of limitations, this Court previously stated:

> The Plaintiff very vaguely claims that on May 2, 2002, Defendant Leslie filed an unspecified "response" in an unspecified case before the Kentucky Supreme Court and therefore, said filing extended the accrual date for the statute of limitations. Courts are not required to accept non-specific factual allegations and inferences or unwarranted legal conclusions. See *Dellis v. Cor. Corp. of Am.*, 257 F.3d 508, 511 (6th Cir. 2001). Moreover, the Plaintiff has filed to establish that any such responsive filing constituted a continuing violation of sufficient kind to extend the date upon which the

> statute of limitations accrued. The statute of limitations did not accrue on May 2, 2002, for the Plaintiff's purpose of filing this action against Defendant Leslie or any of the other named Defendants.

See Memorandum Opinion and Order (Record No. 68 at pp. 15-16).

The Plaintiff now asserts that the Court's prior filing regarding the Plaintiff's reference to an unspecified "response" in an unspecified case before the Kentucky Supreme Court not tolling the statute of limitations was an erroneous ruling. This is because he now takes issue with the prior determination that the Plaintiff's pleadings were not sufficiently specific and clear. The Plaintiff asserts that his pleadings (regarding his reference to an unspecified "response" in an unspecified case before the Kentucky Supreme Court) should have been sufficiently clear to the Court because he had previously filed a copy of this response as Exhibit 16 to his Complaint. The Plaintiff asserts that, pursuant to Federal Rule of Civil Procedure 10(c), "[a] copy of any written instrument which is an exhibit to a pleading is apart thereof for all purposed." Additionally, the Plaintiff asserts that he has, again, supplied a copy of the response by appending it as Exhibit 28 to his present motion.

The Plaintiff argues that, due to Defendants Leslie and the law firm's aforementioned response, the Plaintiff "continued to 'subjected' or 'caused [Plaintiff] to be subjected' to deprivation of his constitutional right to be heard in violation of 1983." See Record NO. 70 at pp. 3-4. However, he concedes that the response of Defendants Leslie and the law firm which is at issue was made within the Kentucky Supreme Court proceedings regarding the Petition for Alias Writ of mandamus Minix filed in the Kentucky Supreme Court. That Petition for Alias Writ of Mandamus was denied by the Kentucky Supreme Court on August 22, 2002. The Response of Defendants Leslie and the law firm within that Alias Writ action was filed on May 2, 2002.

This court previously found that the Petition for Alias Writ of Mandamus Minix filed in the Kentucky Supreme Court was not mandated by the prior Sixth Circuit's February 6, 2001, Order and

that the August 22, 2002, decision regarding Minix's petition for an alias writ of mandamus did not reset the accrual date for the statute of limitations for the claims alleged in this action. The Court concluded that Minix's "filing of the petition for an alias writ of mandamus was a contrived and ineffective action designed to revive the statue of limitations for the herein considered §§ 1983, 1985(2) and 1986 claims." (See Record No. 68 at p. 13). As the entire petition did not reset the accrual of the statute of limitations, a response filed by a party within the adjudication of that petition could not, by itself, reset the accrual of the statute of limitations for the section 1983, 1985(2) and 1986 claims regarding Defendants Leslie and the law firm.

The petitioner also takes issue with this Court's determination that the petition for an alias writ of mandamus before the Kentucky Supreme Court was a "contrived and ineffective action designed to revive the statute of limitations for the herein considered" claims and did not constitute a continuing violation for extending the accrual date of the statute of limitations for this action. The Plaintiff claims his alias writ of mandamus was a necessary and justified action because he had not other way of forcing the Kentucky courts to adjudicate issues he believes were never properly adjudicated. However, he offers no additional information or justification upon which this court should overturn its prior decision on this issue. Additionally, as the Kentucky Supreme Court dismissed the petitioner's petition for an alias writ of mandamus, the appropriate appeal from that decision was to the United States Supreme Court.

By asking this district court to determine that his petition for an alias writ of mandamus before the Kentucky Supreme Court did have merit and was warranted, the petitioner is akin this court to act as an appellate court regarding the issue presented in the Kentucky Supreme Court. However, this is not an appropriate role for this court which has not jurisdiction to consider such a claim.

The *Rooker-Feldman* doctrine, "a combination of the abstention and res judicata doctrine, provides that a federal district court may not hear an appeal of a case already litigated in state court. A party

raising a federal question must appeal a state court decision through the state system and then directly to the Supreme Court of the United States." *United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995) (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923)). The Plaintiff's attempt to re-characterize his Kentucky Supreme Court petition for an alias writ of mandamus as actually having been a CR [Criminal Rule] 76.36 action is wholly unpersuasive, as his domestic relations civil proceeding was not subject to the criminal rules.

Accordingly, Defendants Leslie and the law firm's Response, filed May 2, 2002, in Minix's Petition for an Alias Writ of Mandamus before the Kentucky Supreme Court, does not afford Minix any basis upon which to defeat dismissal of this action for the statute of limitations having expired prior to this action's untimely filing.

b. The Merits of the Case

The merits of the Plaintiff's untimely-filed action are not before the Court as the case has been dismissed for having been filed out of time. Therefore, no consideration will be given to the merits of this case.

C. Defendants Wells' Reply to the Plaintiff's Motion

Wells correctly asserts that, insofar as the Plaintiff's motion is brought as a Motion for Relief from judgment under Rule 59(e), it is an untimely motion because this rule requires that such a motion be brought no later than ten(10) days after entry of the judgment. In this case, the Court entered judgment on October 9, 2003. The Plaintiff's motion was filed on October 21, 2003 and, therefore, was filed out of time. Defendant Wells also correctly notes that, to the extent that the Plaintiff has filed a Fed.R.Civ.P. 60(b) Motion for Relief from Judgment, the Plaintiff has not met the standard required for this Court to grant such a motion as he has merely resorted to reiterating the merits of his complaint.

Wells also asserts that because the Plaintiff filed his Motion simultaneously with a Notice of Appeal, this Court is divested of

jurisdiction to consider the Plaintiff's motion. As a general rule, the district court loses jurisdiction over an action once a party files a notice of appeal and jurisdiction transfers to the appellate court. See *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981), *cert. denied*, 454 U.S. 1152, 102 S. Ct. 1020, 71 L.Ed.2d 307 (1982). However, the Sixth Circuit has consistently held that a district court retains jurisdiction to proceed with matters that are in aid of the appeal. Cochran, 651 F.2d at 1221.

In Lewis v. Alexander, 987 F.2d 392, 394 (6th Cir. 1993), a disappointed habeas petitioner made an untimely appeal of the district court's denial of the writ. The Sixth Circuit held that the district court continued to have jurisdiction to entertain a rule 60(b) motion and went on to discuss the appropriate procedure when an untimely appeal is pending in the court of appeals.

> It is well settled that the filing of a notice of appeal transfers jurisdiction over the merits of the appeal to the appellate court. E.g., *Marrese v. American Academy of Orthopadedic Surgeons*, 470 U.S. 373, 379, 105 S. Ct. 1327, 1331, 84 L.Ed.2d 274 (1985); *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402, 74 L.Ed.2d 225 (1982); *United States v. Holloway*, 740 F.2d 1373, 1382 (6th Cir.), *cert. denied*, 469 U.D. 1021, 105 S. Ct. 440, 83 L.Ed.2d 366 (1984); *Keohane v. Swarco, Inc.*, 320 F.2d 429, 432 (6th Cir. 1963). The district court, however, retains jurisdiction in aid of the appeal. E.g., *Cochran v. Birkel*, 651 F.2d 1219, 1221 (6th Cir. 1981), *cert. denied*, 454 U.S. 1152, 102 S. Ct. 1020, 71 L.Ed.2d 307 (1982); *First National Bank v. Hirsch*, 5353 F.2d 343, 345 n.1 (6th Cir. 1976); *Hogg v. United States*, 411 F.2d 578, 580 (6th Cir. 1969).

Workman v. Tate, 958 F.2d 164, 167 (6th cir. 1992). Consequently, this court still retains jurisdiction over the Plaintiff's motion because to do so aids in the appeal.

Reply

The Plaintiff's Reply to Defendant Wells' Response incorrectly

asserts that his motion was timely filed on October 20, 2003. [Record NO. 79] However, the record establishes that the Plaintiff's motion was filed on October 21, 2003. [Record No. 70] The Plaintiff argues that the contention in his motion that defendants Leslie and the law firm committed an act in furtherance of a conspiracy by filing a pleading in the petition for an alias writ of mandamus was not a contention first raised in this motion. Instead, it is a contention first raised in the Plaintiff's complaint filed April 10, 2003. Thus, the Plaintiff contends that Defendant Wells' assertion that the Plaintiff could not raise this issue for the first time in his motion is not a valid defense to the merits of his motion. As the motion is decided on other grounds, this collateral matter need not be addressed.

Conclusion

Accordingly, for the reasons set forth above, it is hereby **ORDERED** that the Plaintiff's "Motion for Reconsideration, Findings of Facts and Conclusions of Law to Alter or Amend Judgment" [Record No. 70] is **DENIED**. The court will address the remaining motion by separate memorandum opinion.

this 12th day of December, 2003.

s/Danny C. Reeves
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 7:03-113-DCR
MEMORANDUM OPINION AND ORDER
Filed December 12, 2003

Marcus S. Minix, Sr.
Plaintiff

v.

Stephen N. Frazier, et al.
Defendants

This matter is before the Court for consideration of Attorney George Chad Perrys' motion for attorney fees [Record No. 75], the plaintiff's response in opposition [Record No. 78], and Perry's reply [Record No. 80]. Perry seeks $1,000 in fees pursuant to Rule 54(d)(2), Fed.R.Civ.P., and 42 U.S.C. § 1988. Additionally, he seeks interest at the legal rate from the date of judgment awarding fees until paid in full.

In seeking this award, Perry has correctly asserted that he is a prevailing party in this action within the meaning of 42 U.S.C. § 1988. Perry claims that he meets the standard set for in *Hughes v. Rowe*, 449 U.S. 5, 14 (1980), because Minix's claims against him were "frivolous, unreasonable, and without foundation" and that Minix's case was filed "in bad faith." Thus, he claims that an award of attorney's fees is in order. Perry claims that his argument is supported by the fact that: (1) the plaintiff's filing in the Kentucky Supreme Court of a petition for an alias writ of mandamus was a contrived and ineffective action designed to revive the statue of limitations for his present claims; and (2) Minix mad an implausible, not credible, and factually baseless interpretation of the Sixth Circuit's opinion affirming Judge Hood's *sua sponte* dismissal of Mini's prior repetitive claims against Perry. Perry claims that these two rulings

support his assertion that he has met the standard and is entitled to an award f attorney's fees.

Additionally, Perry claims that Minx has proceeded in bad faith because the Plaintiff's lack of success in his first *sua sponte* dismissed action before Judge Hood (which was affirmed by the Sixth Circuit) should have alerted Minix to the statue of limitations defense and should have "restrained him from exposing defendants to repetitive litigation." *Hawkins v. Rhode Island Lottery Com'n*, 238 F.3d 112, 116 (1st Cir. 2001).

Perry contends that a reasonable attorney's fee under 42 U.S.C. § 1988 is determined by the reasonable hourly market rate in the relevant community for similar work multiplied by the amount of hours reasonably expended. See *Blum v. Stenson*, 465 U.S. 886, 893 (1984), and *Hadix v. Johnson*, 65 F.3d 532, 535-36 (6th Cir. 1995). Perry admits that he has not kept any time records. However, he argues that, based upon the pleadings before this court and the time necessary to read the various pleadings served upon him, it is most reasonable to assume that he has spent at least ten hours on his defense in this case. Perry also claims that he has practiced in excess of fifty (50) years and believes he is entitled to $100.00 per hour.

Plaintiff's Response

Minix has filed a joint Response [Record NO. 78] to Frazier's motion [Record No. 73], which also includes his response to Perry's motion [Record No. 75]. It is obvious that some of the plaintiff's arguments in opposition to these two motions only apply to Frazier's motion and have no application to Perry's motion. Only those arguments that have some applicability to Perry's motion will be given consideration below.

Relying on *Kay v. Ehrler*, 499 U.S. 432, 111 S. Ct. 1435 (1991), Minix asserts that Perry's *pro se* defense does not establish a "paying relationship between an attorney and a client." Therefore, he asserts that Perry's request for attorney's fees under 42 U.S.C. § 1988 must be denied. The plaintiff asserts that Perry has not personally incurred any expenses for his own defense and is not entitled to an

award of attorney's fees. Minix also contends that attorney's fees should not be awarded to Perry because he should not be punished for what he characterizes as a failure to recognize subtle factual or legal deficiencies in his claims.

Minix claims that his actions in filing and pursuing this case do not meet the standard necessary to support an award attorney's fees in favor of Perry. He contends that the standard fro awarding fees, as articulated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), and *Hughes v. Rowe*, 449 U.S. 5, 14 (1980), has not been met. Further, he argues that his claims were neither frivolous, unreasonable, nor groundless. The plaintiff also asserts that he did not continue to litigate any claims after if became clear that his claims were frivolous, unreasonable or groundless.

According to Minix, the only potential reason that such an award could be made to Perry would be that the plaintiff's *pro se* complaint did not survive a motion to dismiss. He contends that this is an insufficient basis upon which to award attorney's fees. The plaintiff argues that, although the case had previously been dismissed on statute of limitations grounds, he had reasonable grounds for bringing this suit because he contends that had the court not been barred by the statue of limitations, the court would have found that his underlying claims have merit.

Perry's Reply

Perry addresses the plaintiff's "no paying relationship" defense in his brief reply. He asserts that he practices in a three-lawyer office where his time goes in a common fee-splitting fund, and that the time he took from that pooled practice to defend himself is "like taking money out of all three lawyers' pockets."

Perry also addresses the plaintiff's claims that his conduct does not meet the standard for awarding attorney's fees to Perry. Perry mentions that he and an otherwise unidentified person named Miller (apparently is Perry's legal associate/partner) briefly represented Minix in the plaintiff's divorce action in 1986. Perry asserts that now, almost eighteen years later, because of that brief representation, he is

still involved in yet another repetitious and unfounded form of litigation instigated by Minix. This, Perry contends, is evidence of the high degree of bad faith, frivolousness, unreasonableness and groundlessness that is manifested in Minix's continuous litigation, including the case which is presently before this court.

Perry asserts that the bad faith standard for awarding attorney's fees has been met by Minix's action of bringing this groundless case, for repetitiously bringing these claims, and for Minix having filed a notice of appeal in this case despite this court's ruling that any such appeal would NOT be taken in good faith. Perry asserts that Minix "doesn't listen to courts" and that "[t]here has to be some end to this." Perry also argue that his request for only $1,000 is "most reasonable."

Legal Analysis

An award of attorney's fees to a prevailing party in a 42 U.S.C. § 1983 action is proper when: (1) the party seeking the award of attorney's fees has prevailed in the matter; (2) the fee request is reasonable; and (3) a satisfactory basis for the hours expended is reflected in the success achieved. See *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994).

Perry has been awarded judgment in this action, and the plaintiff's claims have been dismissed as having been barred by the statute of limitations. The plaintiff does not assert that Attorney perry is not a prevailing party. Moreover, Defendant perry has succeeded on the significant issue, the statute of limitations issue. Consequently, Perry is a prevailing party in this action. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

To calculate whether Perry's request for legal fees is reasonable, the court ordinarily would calculate the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. at 433, 424 (1983). Here, Perry seeks only a lump sum of $1,000. That amounts obviously is well below what Perry is entitled to recover, given the fact that this case has been pending since April 10, 2003, and that as of November 17,

2003, the record contained 83 docket entries involving over twenty motions. An expenditure of only 10 hours at $100 per hour for an attorney with more than fifty years experience is more than reasonable. Additionally, it is noted that counsel for Defendant Frazier, conservatively seeks $5,750.00 as attorney's fees for this case up to the plaintiff filed his notice of appeal on October 21, 2003. Consequently, the amount of the attorney's fee sought by Perry is more than reasonable.

A. Standard for Attorney's Fee Award

The plaintiff alleges this case do not meet the standards established in *Hughes v. Rowe*, 449 U.S. 5, 13 (1980), for awarding attorney's fees to the prevailing defendant who is also an attorney. In *Roane v. City of Mansfield*, 229 F.3d 1153, 2000 WL 1276745 (6th Cir (Ohio)) (unpublished opinion), the standards for awarding attorney's fees pursuant to 42 U.S.c. § 1988 were discussed:

> Section 1988 places the award of reasonable attorney's fees within the discretion of the district court; however, the district court "must provide a clear and concise explanation of its reasons for the fee award." See *Hadix v. Johnson*, 65 F.3d 532, 534 (6th Cir. 1995) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)); *Louisville Black Police Officers Org., Inc v. City of Louisville*, 700 F.2d 268, 273 (6th Cir. 1983). . .
>
> Section 1988 provides that in cases brought pursuant to § 1983, "the court, in its discretion, may allow the prevailing party . . a reasonable attorney's fee as part of the costs . ." 42 U.S.C. § 1988(b). With respect to attorney's fees awarded to defendants in civil rights actions, this court has observed that "[a]n award of attorney's fees against a losing plaintiff in a civil rights action is an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986) (emphasis added). That is to say, attorney's fees may be awarded to prevailing defendants under § 1988 only when the plaintiff's suit "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christianburg Garment Co. v. EEOC*,

> 434 U.S. 412, 421 (1978). [FN1. The standards set forth by the Supreme Court in *Christianburg* regarding "prevailing party" status for purposes of a Title VII claim, govern attorney's fee awards brought under § 1988. See Hughes v. Rowe, 449 U.S. 5, 14 (1980)] . . Awarding attorney's fees to prevailing defendant sin civil rights actions in only the most extreme and egregious cases of misconduct. . . comports with the purpose of § 1983. . . *York v. Ferris State Univ.*, 36 F.Supp. 2d 976, 980-83 (W.D. mich. 1998); see also Jeffrey J. Fowler, Annotation, *Right of Prevailing Defendant to Recover Attorneys' Fees Under § 706(k) of Civil Rights Act of 1964 (432 U.S.C.A. § 2000 E-5(k)*, 134 A.L.R. Fed. 161 (1996).

Id. at **1

In *Dubuc v. Green Oak Township*, 312 F.3d 736 (6th Cir. 2003), the court discussed the standards and procedures under which a district court may award attorney's fees to a prevailing party defendant. Although the *Dubuc* court overturned the district court's award, the standards are relevant here. The fee issue in *Dubuc* was also based on 42 U.S.C. § 1988, "which allows fees to be awarded, at the judge's discretion, to the prevailing party in a § 1983 action." *Dubuc*, 312 F.3d at 754. The court added.

> Such fee awards to defendants are limited to instances of egregious misconduct by a plaintiff, based "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation . . And, needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith." *Christiansburg Garmet Co. v. EEOC* 434 U.S. 412, 421-22, 98 S. Ct. 694, 54 L.Ed.2d 648 (1978). See *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S. Ct. 173, 66 L.Ed.2d 163 (1980) (applying this standard to a case involving § 1983 and § 1988); see also *Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001); *Jones v. Continental Corp.*, 789 F2d 1225, 1232 (6th Cir. 1986); *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 182 (6th Cir. 1985).

Id. at 754-755. Consequently, to determine whether Defendant Perry is entitled to an award of attorney's fees pursuant to 42 U.S.C. §

1988, this court must determine: (1) whether Minix's actions were "frivolous, unreasonable, or without foundation"; and (2) whether Minix brought or continued his claims in bad faith.

As this court has previously explained in its Memorandum Opinion and Order of October 9, 2003 [Record No. 68], on January 24, 2000, Minix filed *Marcus S. Minix Sr. v. Stephen N. Frazier and George Chad Perry*, Pikeville Civil Action No. 7:00-32 (hereinafter "00-32") which, like the present case, was a civil rights complaint and which, like the present case, was based on claims that Minix's right to due process during his divorce and custody proceedings had been denied by Kentucky courts. Because it was apparent from the face of the 00-32 complaint that Minix's claims were obviously barred by the statute of limitations, the Court (Judge Joseph Hood presiding) determined, by Memorandum Opinion and Order filed February 11, 2000, that *sua sponte* dismissal was appropriate.

As in the case at bar, Minix than filed a motion to alter or amend, asserting that his aciton was not time-barred because the court had not given consideration to the merits of his claims. Minix's motion was denied and Minix appealed. The Sixth Circuit characterized Minix's case as being "patently meritless" and said that "the allegations in his complaint clearly show that his civil rights action was time-barred." See Memorandum Opinion and Order of October 9, 2003 [Record No. 68] at p. 8, quoting *Marcus S. Minix v. Stephen N. Frazier; George Chad Perry*, 4 Fed.Appx. 230, 2001 WL 128346 (6th Cir. (Ky.) Feb. 6, 2001) (unpublished disposition). Thereafter, Minix went back to the Kentucky Supreme Court where he filed a petition for an alias writ of mandamus, which was denied by that court.

Next, and in spite of an abundance of judicially rendered repudiating signals to him, Minix again returned to this court with the presently considered, wholly repetitious, and previously dismissed claims. Eventually, Minix asserted that the filing of the alias writ before the Kentucky Supreme Court somehow extended or refreshed the time in which the statue of limitations accrued for his claims. This court concluded that Minix's "filing of the petition for an alias

writ of mandamus was a contrived and ineffective action designed to revive the [expired] statute of limitations" and that Minix's "interpretation of the Sixth Circuit's language is implausible, non-credible, and factually baseless." See Record No. 68 at p. 13.

The court noted that Minix spuriously attempted to claim that his own actions constituted a continuing violation by the defendants. Id. Based upon the aforementioned facts, this court now concludes that: (1) Minix's presently considered action if 'frivolous, unreasonable, and without foundation" within the meaning of *Christiansburg Garmet Co., v. EEOC*, 434 U.S. 412, 421-22, 98 S. Ct. 694, 54 L.Ed.2d 648 (1978), and *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S. Ct. 173, 66 L.Ed.2d 163 (1980); and (2) Minix both brought and continued the herein asserted claims in bad faith. Consequently, Minix has exhibited conduct that meets the relevant standards under which Perry is entitled to an award of attorney's fees.

B. "Subtle Factual or Legal Deficiencies"

The plaintiff asserts that he should not be "punished" for his alleged failure to recognize what he characterizes to be "subtle factual or legal deficiencies in his claims." However, the fact that claims can no longer be pursued because the statute of limitations has expired is a basic, easily understandable, and fundamental legal concept that has been carefully explained for the plaintiff long before he filed this complaint. Under the facts of this case, the statue of limitations deficiency of Minix's claims is not a "subtle factual or legal" concept. The plaintiff's "complexity" defense of having re-filed and vigorously re-litigated repetitious and previously barred claims lacks credibility. This defense affords no basis upon which to deny Perry's motion for attorney's fees.

C. The Attorney/Client Relationship

An award of attorney's fees cannot be avoided by the plaintiff's allegations that Perry was required to, but did not, have a "paying relationship" with his attorney. The plaintiff alleges that *Kay v. Ehrler*, 499 U.S. 432, 111 S. Ct. 1435 (1991), is applicable and the *Kay* requires that Perry must have had a "paying relationship between an

attorney and a client" before attorney's fees can be awarded to him. However, even if the "paying relationship" language of *Kay* is applicable, the plaintiff is incorrect in his assertion that Perry had no such "paying relationship" with his office colleagues and members of his law firm. Therefore, he is incorrect in arguing that attorney's fees cannot be awarded to Perry.

Kay applied to a prevailing pro se plaintiff who was also an attorney representing himself. Here, Perry is a prevailing defendant who was proceeding *pro se* and to the detriment of the common fee-splitting fund of his three-lawyer office. Thus, unlike the *pro se* attorney plaintiff in *Kay*, Perry is part of a larger organization. Perry asserts that "in order to defend himself" was "like taking money out of all three lawyers' pockets." [Record No. 81] Consequently, Perry's common fee-splitting three-lawyer office, in essence, supplied "in-house" counsel to Perry, in the form of Perry, for his defense in this case. As a result, *Kay* is distinguishable and does not apply in this case.

In *Bond v. Blum*, 317, F.3d 385 (4th Cir. 2003), the Fourth Circuit explained circumstances when the equivalent of in-house counsel may be awarded attorney's fees under a fee-shifting statute:

> the principles of *Kay* . . do not apply in circumstance where entities represent themselves through in-house or *pro bono* counsel. In *Kay*, the Supreme Court explained the distinction: "[A]n organization is not comparable to a pro se litigant because the organization is always represented by counsel, whether in-house or pro bono, and thus, there is always an attorney-client relationship." 499 U.S. at 436 n. 7, 111 S.Ct. 1435. When a member of an entity who is also an attorney represents the entity, he is in an attorney-client relationship with the entity and, even though interested in the affairs of the entity, he should not be so emotionally involved in the issues of the case so as to distort the rationality and competence that comes from independent representation. Accordingly, a State's own attorneys representing the State may be awarded

attorneys' fees under a fee-shifting statute. See *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363 (7th Cir. 2000). And in-house counsel representing the corporation for whom they work may also be awarded attorneys fees. See. *Textor v. Bd. of Regents of Norther Ill. Univ.*, 711, F.2d 1387, 1396 (7th Cir. 1983) ("Defendants chose to hire in-house counsel because that was the most efficient means of handling a large amount of legal work . . [F]or every hour in-house counsel spent on this case, defendants lost an hour of legal services that could have been spent on other matters").

Id. at 399-400.

Consequently, the plaintiff's reliance on *Kay* for the proposition that attorney's fees may not be awarded under the circumstances of this case is unavailing. Where Perry was acting as in-house counsel for what he characterized in his motion to be his "law firm" [Record No. 75 at p.1] and/or was doing so in a manner whereby he and members of his firm" for every hour in-house counsel spent on this case ...[Perry and the members of his firm] ... lost an hour of legal services that could have been spent on other manners," the rule in *Kay* is not applicable. Id.

In reaching this result, the Court notes that an attorney proceeding as *pro se* plaintiff has been denied attorney's fees. *Prousalis v. Jamgochian*, 38 Fed.Appx. 903, 2002 WL 1343745 (4th Cir. (Va.)). The court also notes that an attorney defendant proceeding *pro se* has been denied a district court's award of attorney's fees afforded to him pursuant to Fed.R.Civ.P. 11, because legal fees were "not truly a 'cost' of litigation" and "no independent lawyer . . . must be paid." *Massengale v. Ray*, 267 F.3d 1298 (11th Cir. 2001) ("[b]ecause a party proceeding pro se cannot have incurred attorney's fees as an expense, a district court cannot order a violating party to pay a *pro se* litigant a reasonable attorney's fee as part of a sanction.")

A *pro se* defendant cannot recover attorney fees under the Equal Access to justice Act, because the term "attorney" in the statute contemplated an agency relationship between the attorney and a client which was absent in that *pro se* context. S.E.C. v. Price

Waterhouse, 41 F.3d 805 (2nd cir. 1994) (court applied kay v. Ehrler, 449 U.S. 432, 111 S. Ct. 1435, 113 L.Ed.2d 486 (1991), for the concept that with regard to its application use in a federal statute the term "attorney" contemplates an agency relationship that is absent in the pro se context). In *Pickholtz v. Rainbow Technologies, Inc.* 284 F.3d 1365, 1375 (Fed. Cir. 2002), and in the context of a Rule 37 discovery violation sanction, the court held that "one cannot 'incur' fees payable to oneself, fees that one is not obliged to pay." In *DiPaolo v. Moran*, 277 F.Supp.2d 528 (E.E. Pa. June 27, 2003), the court noted that:

> Approximately twenty years before *Massengale* and *Pickholtz* were decided, the Ninth Circuit in *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980), upheld an award of attorneys' fees to *pro se* attorney defendants pursuant to Section 706(k) of the Civil Rights Act of 1964 . . . Although the court articulated many public policy reasons in support of its holding -- all of which were well-reasoned -- the court never addressed the implication of the statutory term "attorney" [which was addressed in *Kay*] . . . the validity of *Ellis* is questionable given the Supreme Court's decision in *Kay*.

DiPaolo, 277 F.Supp.2d at *536.

The Court's ruling granting Perry's motion for attorney's fees is based upon a factual allegation, undisputed by the plaintiff, that, when he was defending this lawsuit, Perry was acting essentially as in-house counsel for his "law firm" and that his actions were taken to the financial detriment not just for himself, but also to other members of that firm.

Accordingly, it is hereby **ORDERED** that Defendant Perry's motion is granted to the extent that he is awarded attorney's fees in the amount of $1,000.00, with interest to accrue on this amount from the entry of this Order at the legal rate. However, any request for attorney's fees incurred in connection with the Plaintiff's appeal to the Sixth Circuit should be addressed in the first instance with that court. Therefore, to the extent Defendant Perry's motion seeks

a further award from this court or seeks to stay the court's determination of the amount of the fee award, his motion is **DENIED**.

This 12th day of December, 2003.

s/Danny C. Reeves
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 7:03-113-DCR
MEMORANDUM OPINION AND ORDER
Filed December 12, 2003

Marcus S. Minix, Sr.
Plaintiff

v.

Stephen N. Frazier, et al.
Defendants

This matter is before the Court for consideration of Judge Stephen N. Frazier's (hereafter, the "Defendant" or "Frazier") motion for attorney fees as a prevailing party [Record No. 73], the plaintiff's response to this motion [Record No. 78], and Frazier's reply [Record No. 83]. In addition, Frazier seeks an award of interest from the date of that award and asks the Court to stay the determination of the final amount of the fee award until the conclusion of any appeal instituted by the plaintiff so that said award can include payment for any further time accrued on the appeal.

Frazier has correctly asserted that he is, within the meaning of 42 U.S.C. § 1988, a prevailing party in this action because this is the plaintiff's second effort to recover for essentially the same claims, and his lack of success in the first instance should have put him on notice of those claims' flaws and expired statute of limitations and "should have restrained him from exposing defendant to repetitive litigation." *Hawkins v. Rhode Island Lottery Com'n*, 238 F.3d 112, 116 (1st Cir. 2001). Frazier contends that the standards for this court to award attorney's fees to him have been met. *Hughes v. Rowe*, 449 U.S. 5, 14 (1980).

The plaintiff has filed a joint response to Frazier's Motion [Record

No. 78], which is also his response to Defendant Perry's Motion for an award of attorney's fees. [Record No. 75] The plaintiff contends that Frazier is not entitled to any award.

A. No "Paying Relationship"

Relying on Kay v. Ehrler, 499 U.S. 432, 111 S. Ct. 1435 (1991), Minix asserts that in order for Frazier to recover attorney's fees, he must have had a "paying relationship between an attorney and a client." He asserts that Frazier and D. Brent Irvin had no such "paying relationship" and, therefore, Frazier's request for attorney's fees under 42 U.S.C. § 1988 must be denied. The plaintiff asserts that because Frazier is paid by the Commonwealth of Kentucky and because Frazier's counsel/attorney, D. Brent Irvin, is an Assistant Attorney General who is also paid by the Commonwealth of Kentucky, there was no paying relationship between the attorney [D. Brent Irvin] and the client [Judge Frazier].

The plaintiff argues that Frazier has not personally incurred any expenses for his own defense and, therefore, he is not entitled to an award of attorney's fees. Minix asserts that attorney's fees "cannot be awarded to a non-party, such as the Finance & Administration Cabinet," because pursuant to *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), a state cannot be sued under section 1983.

B. No "Punishment" for "Subtle Deficiencies"

Minix also contends that attorney's fees should not be awarded to Frazier because the plaintiff "should not be punished" for what he characterizes to be "his failure to recognize subtle factual or legal deficiencies in his claims."

C. Standard For Awarding Attorney's Fees Not Met

Minix argues that his actions in filing and pursuing this case do not meet the standard of conduct necessary to support an award of attorney's fees to Frazier. The plaintiff contends that the standard for awarding fees, as it was articulated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) and Hughes v. Rowe, 449 U.S. 5, 14 (1980) has not been met. Consequently, he contends that attorney's

fees should not be awarded to Frazier. The plaintiff asserts that his claims were neither frivolous, unreasonable nor groundless. The plaintiff also asserts that he did not continue to litigate any claims after it became clear that his claims were frivolous, unreasonable or groundless.

Finally, the plaintiff argues that the sole potential reason that an attorney's fee award could be made to Frazier would be because the plaintiff's *pro se* complaint did not survive a motion to dismiss. The plaintiff contends that is an insufficient basis upon which to award attorney's fees.

D. Assertion That The Underlying Claims Are Meritorious

Minix asserts that no attorney's fee award is in order because the underlying claims have merit. The plaintiff sets forth that although this case had previously been dismissed on statute of limitations grounds, he still had reasonable grounds for bringing it again because if the expired statute of limitations had not barred the court from considering the underlying claims, then the court would have found that those claims to have merit.

E. "Paying Relationship"

Frazier asserts that the plaintiff's reliance on *Kay v. Ehrler*, 499 U.S. 432 (1999), is misplaced because *Kay* is inapplicable and notwithstanding it application, its "paying relationship" requirement is fulfilled by the "in-house" nature of Frazier's relationship to the Commonwealth of Kentucky and Attorney D. Brent Irvin. In addition, Frazier claims that *Kay* is distinguishable because it involved a plaintiff/attorney who acted as his own attorney, which is not the situation presented in this case. Although an attorney and judge, Frazier has not acted as his own counsel in this matter.

Frazier argues that Kay, by its own terms, establishes that is "paying relationship" language is irrelevant and inapplicable or is fulfilled when a defendant is represented "in-house." Kay's "paying relationship" language is inapplicable to Frazier because he is a part of the Commonwealth of Kentucky. Alternatively, Kay's "paying relationship" language is fulfilled by the fact that Frazier is a part of

an organization (i.e., the Commonwealth of Kentucky) in which he is represented "in-house." He contends that "an organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono*, and thus, there is always an attorney-client relationship." *Kay* 499 U.S. at 436 n.7.

Frazier also argues that he is entitled to an award of attorney's fees because a state's own attorney representing the state may be awarded attorney's fees. *Wisconsin v. Hotline Indus., Inc.* 236 F.3d 363 (7th Cir. 2000) (state's attorneys awarded attorney's fee under a federal fee-shifting statute); *American Family Life Assur. Co. of Columbus v. Teasdale*, 733 F.2d 559 (8th Cir. 1984) (attorney's fees award upheld under 42 U.S.C. § 1988 for three salaried assistant attorneys general in defending state official in a frivolous civil rights suit); *Napier v. Thirty or More Unidentified Fed. Agents*, 855 F.2d 1080, 1092-93 (3rd Cir. 1988) (Assistant United States Attorneys awarded fees under Fed.R.Civ.P. 11 for defending a frivolous lawsuit). Frazier contends that the fact that he does not have a personal paying relationship with D. Brent Irvin is no bar to an award of attorney's fees. Blanchard v. Bergeron, 489 U.S. 87, 95 (1989) (fees may be awarded to a 42 U.S.C. § 1983 prevailing party even if the legal services organization representing that prevailing party is, by contract with that prevailing party, precluded from charging that prevailing party a fee).

F. Standard for Awarding Attorney's Fees Is Met

Frazier contends that Minix's conduct meets the standard justifying an award of attorney's fees in that his claims are" frivolous, unreasonable or without foundation." Frazier further asserts that the fact that Minix has filed this repetitious suit, which was previously dismissed on statute of limitations grounds and affirmed on that basis by the Sixth Circuit, constitutes "objective bad faith." Frazier also asserts that the plaintiff knew, or should have known, that he was entitled to judicial immunity and that the plaintiff's claims against him further constituted objective bad faith. For these reasons, Frazier seeks to have the plaintiff-not the taxpayers of Kentucky - pay the costs of his representation in this case.

Through his assertions that the plaintiff's actions constitute objective bad faith, Frazier, in essence, argues that the plaintiff's contumacious actions cannot be attributed to "his failure to recognize subtle factual or legal deficiencies in his claims."

G. Underlying Merits

Frazier asserts, in essence, that because the plaintiff's claims necessitate dismissal based on the statute of limitations, therefore, the merit (or lack of merit) of his underlying claims is irrelevant and has no bearing on the outcome of the award of attorney's fees.

H. Standard

An award of attorney's fees to a prevailing party in a 42 U.S.C. § 1983 action is proper when: (1) the party seeking the award of attorney's fees has prevailed in the matter; (2) the fee request is reasonable; and (3) a satisfactory basis for the hours expended is reflected in the success achieved. See *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994).

I. Prevailing Party

Frazier is a prevailing party in this action. This Defendant has been awarded judgment and the plaintiff's claims have been dismissed with prejudice as barred by the statute of limitations. The plaintiff does not assert that Frazier is not a prevailing party. Frazier has succeeded on the significant statute of limitations issue. Consequently, Frazier is a prevailing party. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

In addition, Frazier's fee request is reasonable and is reflected in the result achieved in this case. Frazier has submitted with his motion the affidavits of D. Brent Irvin (the attorney of record from the office of the Attorney General of the Commonwealth of Kentucky who has defended Frazier) and the affidavit of the Attorney General's Administrative Assistant, Georgetta Tolliver. Irvin verifies that the Attorney General's Office is authorized, pursuant to K.R.S. § 12.211, to defend state employees, that the Commonwealth seeks the below-market rate of only $100 per hour for its services rendered,

and that 57.5 hours have been expended on this case for a total of $5,750 for legal services rendered, apparently though October 22, 2003.

To calculate whether Frazier's request for legal fees is reasonable, the court will calculate the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. at 433, 424 (1983). Here, Irvin very modestly seeks only $100 per hour (an amount that is below the market rate) and he properly submits itemized billing records that substantiate his work on behalf of Frazier. Those time record establish that Irvin has spent 57.5 hours defending Frazier in this case. Given the fact that this case has been pending since it was filed on April 10, 2003, and that as of November 17, 2003, the record contained 83 docket entries involving well over twenty motions, an expenditure of only 57.5 hours is very reasonable. Thus, Frazier reasonably seeks $5,750 as an attorney's fee for this case up to and until the plaintiff filed his notice of appeal on October 21, 2003.

J. "Subtle Factual or Legal Deficiencies"

The plaintiff claims that he should not be "punished" for his purported failure to recognize the statute of limitations problems as "subtle factual or legal deficiencies in his claims."

Again, the factual and legal deficiencies in the plaintiff's case are not subtle. The pivotal deficiency in the plaintiff's previous and current repetitious litigation is that both actions have been filed outside the statute of limitations. Application of the statute of limitations in these cases is an easily understandable and fundamental legal concept. The statute of limitations bar was carefully explained for the plaintiff by this Court and by the Sixth Circuit long before Minix filed the present complaint. The statute of limitations concept in the case at bar is neither a "subtle factual or legal" concept. Of the plaintiff's excuses for having filed and vigorously litigated these repetitious and previously-barred claims, this excuse lacks credibility. It affords no basis upon which to deny Frazier's motion for attorney's fees.

K. Client to Attorney Paying Relationship

Kay v. Ehrler, 499 U.S. 432, 111 S. Ct. 1435 (1991), does not require that Frazier have a "paying relationship" with his attorney in order for Frazier to recover attorney's fees. *Kay* does not preclude an award of attorney's fees to Frazier. *Kay* is factually distinguishable and, therefore, its "paying relationship" language does not apply here. *Kay* applied to a prevailing *pro se* plaintiff who was also an attorney representing himself. Frazier is a prevailing defendant who was not proceeding *pro se*. Instead, this Defendant was represented by Attorney Irvin of the Attorney General's office.

Kay is also legally distinguishable. Its "paying relationship" language is inapplicable where, as here, a party is represented "in-house." Assistant Attorney General Irvin, counsel for Frazier, has verified that the Attorney General's Office is authorized, pursuant to K.R.S. $12.211, to defend state employees. Frazier, as part of a large organization (the Commonwealth of Kentucky), was supplied "in-house" counsel for his defense. In *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003), the Fourth Circuit found that a state's attorney representing the state's officials may be awarded attorney's fees under a fee-shifting statute. The court explained that:

> the principles of Kay . . do not apply in circumstance where entities represent themselves through in-house or *pro bono* counsel. In *Kay*, the Supreme Court explained the distinction: "[A]n organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono*, and thus, there is always an attorney-client relationship." 499 U.S. at 436 n. 7, 111 S.Ct. 1435. When a member of an entity who is also an attorney represents the entity, he is in an attorney-client relationship with the entity and, even though interested in the affairs of the entity, he should not be so emotionally involved in the issues of the case so as to distort the rationality and competence that comes from independent representation. Accordingly, a State's own attorneys representing the State may be awarded attorneys' fees under a fee-shifting statute. See *Wisconsin v.*

Hotline Indus., Inc., 236 F.3d 363 (7th Cir. 2000). And in-house counsel representing the corporation for whom they work may also be awarded attorneys fees. See. *Textor v. Bd. of Regents of Norther Ill. Univ.*, 711, F.2d 1387, 1396 (7th Cir. 1983) ("Defendants chose to hire in-house counsel because that was the most efficient means of handling a large amount of legal work . . [F]or every hour in-house counsel spent on this case, defendants lost an hour of legal services that could have been spent on other matters").

Id. at 399-400.

Moreover, a state's own attorneys representing the state may be awarded attorney's fees pursuant to a fee-shifting statute[1]. *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363, 366 (7th Cir. 2000) ("it's makes sense to compensate government lawyers in the same manner as privately retained counsel"); see also *American Family Life Assur. Co. of Columbus v. Teasdale*, 733 F.2d 559 (8th Cir. 1984) (appellate court upheld attorney's fees award under 42 U.S.C. § 1988 for time spent by three salaried assistant attorneys general in defending a frivolous civil rights suit); *Napier v. Thirty or More Unidentified Fed. Agents,* 855 F.2d 1080, 1092-93 (3d Cir. 1988) (Assistant United States Attorneys awarded fees under Fed.R.Civ.P. 11 for defending frivolous lawsuit). The plaintiff's reliance on *Kay* is a mistaken reliance. *Kay* and its "paying relationship" language do not bar an award of attorney's fees to Judge Frazier.

L. Will v. Michigan

An award of attorney's fees to Frazier is not prohibited by *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). Will stands for the proposition that a state cannot be sued under 42 U.S.C. § 1983. Minix wrongly asserts that, because a state cannot be sued under § 1983, attorney's fees cannot be awarded to the state when it is improperly sued. The plaintiff offers no authority - and the court is

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[1]In *Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363 (7th Cir. 2000), the fee-shifting statute was 28 U.S.C. § 1447(c).

unaware of any authority - for this unfounded and meritless assertion.

M. Standards to Award Attorney's Fees Are Met

The standards under which an award of attorney's fees may be made have been met by the plaintiff's conduct. Consequently, attorney's fees may be awarded to Frazier. In Roane v. City of Mansfield, 229 F.3d 1153, 2000 WL 1276745 (6th Cir. (Ohio)) (unpublished opinion), the standards for awarding attorney's fees pursuant to 42 U.S.C. § 1988 were discussed:

> Section 1988 places the award of reasonable attorney's fees within the discretion of the district court; however, the district court "must provide a clear and concise explanation of its reasons for the fee award." See *Hadix v. Johnson*, 65 F.3d 532, 534 (6th Cir. 1995) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)); *Louisville Black Police Officers Org., Inc v. City of Louisville*, 700 F.2d 268, 273 (6th Cir. 1983). . .
>
> Section 1988 provides that in cases brought pursuant to § 1983, "the court, in its discretion, may allow the prevailing party . . a reasonable attorney's fee as part of the costs . ." 42 U.S.C. § 1988(b). With respect to attorney's fees awarded to defendants in civil rights actions, this court has observed that "[a]n award of attorney's fees against a losing plaintiff in a civil rights action is an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986) (emphasis added). That is to say, attorney's fees may be awarded to prevailing defendants under § 1988 only when the plaintiff's suit "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). [FN1. The standards set forth by the Supreme Court in *Christianburg* regarding "prevailing party" status for purposes of a Title VII claim, govern attorney's fee awards brought under § 1988. See Hughes v. Rowe, 449 U.S. 5, 14 (1980)] . . Awarding attorney's fees to prevailing

> defendant sin civil rights actions in only the most extreme and egregious cases of misconduct. . . comports with the purpose of § 1983. . . *York v. Ferris State Univ.*, 36 F.Supp. 2d 976, 980-83 (W.D. mich. 1998); see also Jeffrey J. Fowler, Annotation, *Right of Prevailing Defendant to Recover Attorneys' Fees Under § 706(k) of Civil Rights Act of 1964 (432 U.S.C.A. § 2000 E-5(k)*, 134 A.L.R. Fed. 161 (1996).

Id. at **1

In *Dubuc v. Green Oak Township*, 312 F.3d 736 (6th Cir. 2003), the court discussed the standards and procedures under which a district court may award attorney's fees to a prevailing party defendant. Although the *Dubuc* court overturned the district court's award, the standards are relevant here. The fee issue in *Dubuc* was also based on 42 U.S.C. § 1988, "which allows fees to be awarded, at the judge's discretion, to the prevailing party in a § 1983 action." *Dubuc*, 312 F.3d at 754. The court added.

> Such fee awards to defendants are limited to instances of egregious misconduct by a plaintiff, based "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation . . And, needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith." *Christiansburg Garmet Co. v. EEOC* 434 U.S. 412, 421-22, 98 S. Ct. 694, 54 L.Ed.2d 648 (1978). See *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S. Ct. 173, 66 L.Ed.2d 163 (1980) (applying this standard to a case involving § 1983 and § 1988); see also *Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001); *Jones v. Continental Corp.*, 789 F2d 1225, 1232 (6th Cir. 1986); *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 182 (6th Cir. 1985).

Id. at 754-755. Consequently, to determine whether Defendant Frazier is entitled to an award of attorney's fees pursuant to 42 U.S.C. § 1988, this court must determine: (1) whether Minix's actions were "frivolous, unreasonable, or without foundation"; and (2) whether Minix brought or continued his claims in bad faith.

As this court has previously explained in its Memorandum Opinion

and Order of October 9, 2003 [Record No. 68], on January 24, 2000, Minix filed *Marcus S. Minix Sr. v. Stephen N. Frazier and George Chad Perry*, Pikeville Civil Action No. 7:00-32 (hereinafter "00-32") which, like the at bar, was a civil rights complaint and which, like the case at bar, was based on claims that Minix's right to due process during his divorce and custody proceedings had been denied by Kentucky courts. Because it was apparent from the face of the 00-32 complaint that Minix's claims were obviously barred by the statute of limitations, the Court (Judge Joseph Hood presiding) determined, that *sua sponte* dismissal, without prejudice, was appropriate. As in the present case, Minix then filed a motion to alter or amend, asserting that his action was not time-barred because the court had not given consideration to his assertion that the state had not provided due process for him.

Minix's motion was denied and he appealed. The Sixth Circuit characterized Minix's case as being "patently meritless" and said that "the allegations in his complaint clearly show that his civil rights action was time-barred." See memorandum Opinion and Order of October 9, 2003 [Record No. 68] at p. 8, quoting *Marcus S. Minix v. Stephen N. Frazier; George Chad Perry*, 4 Fed.Appx. 230, 2001 WL 128346 (6th Cir. (Ky.) Feb. 6, 2001) (unpublished disposition). Thereafter, Minix went back to the Kentucky Supreme Court where he filed a petition for an alias writ of mandamus, which was denied by that court. Next, and in spite of an abundance of judicially rendered repudiating signals to him, Minix again returned to this court, with the presently considered and wholly repetitious action. Eventually, Minix asserted that the filing of the alias writ extended or refreshed the time in which the statute of limitations accrued for his claims. This court concluded that Minix's "filing of the petition for an alias writ of mandamus was a contrived and ineffective action designed to revive the [expired] statute of limitations" and that Minix's "interpretation of the Sixth Circuit's language is implausible, non-credible, and factually baseless." See Record No. 68 at p. 13.

The court noted that Minix spuriously attempted to claim that his own actions constituted a continuing violation by the defendants. Id.

Based upon the aforementioned facts, this court now concludes that (1) Minix's presently considered action is "frivolous, unreasonable and without foundation" within the meaning of *Christiansburg Gormet Co. v. EEOC*, 434 U.S. 412, 421-22, 98 S.Ct. 694 (1980); and (2) Minix both brought and continued the herein asserted claims in bad faith.

Consequently, Minix has exhibited conduct that meets the relevant standards by which Frazier is entitled to an award of attorney's fees.

N. Underlying Merits

Minix alleges that he underlying claims in his complaint have merit. He contends that because of this purported merit he should be entitled, without consequences, to ignore the fact that the statue of limitations on those claims has expired. The plaintiff cites no authority for this allegation, and the court is any support for his assertion. The plaintiff's assertion affords the plaintiff no defense to this court awarding Frazier attorney's fees.

Conclusion

For the reason set forth herein, it is hereby

ORDERED that Defendant Frazier's motion is **GRANTED** to the extent that he is awarded attorney's fees in the amount of $5,750.00, with interest to accrue on this amount from the entry of this Order at the legal rate. However, any request for attorney's fees incurred in connection with the Plaintiff's appeal to the Sixth Circuit should be addressed in the first instance with that court. Therefore, to the extent Defendant Frazier's motion seeks a further award from this court or seeks to stay the court's determination of the amount of the fee award, his motion is **DENIED**.

This 12th day of December, 2003.

s/Danny C. Reeves
United State District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 7:03-113-DCR
MEMORANDUM OPINION AND ORDER
Filed December 12, 2003

Marcus S. Minix, Sr.
Plaintiff

v.

Stephen N. Frazier, et al.
Defendants

This matter is before the Court for consideration of Defendant George Keith Wells' motion for attorney's fees [Record No. 82] and Plaintiff Minix's response to that motion [Record No. 84]. For the reasons discussed below, this motion will be granted and Defendant Wells will be awarded attorney fees in the sum of $4,873.55.

Through his verified motion, Wells seeks an Order and Judgment directing the plaintiff to pay reasonable attorney's fees for his counsel's work in connection with the services rendered in obtaining Wells' dismissal from this action. The Defendant relies on the authorities cited in Judge Frazier's similar motion and supporting documents. Well's counsel has attached redacted copies of the billing summaries which have been forwarded to Wells' insurance carrier. These records show that his counsel has spent 42.5 hours in defense of the complaint against him. The hourly rate of $110 is claimed to be within the prevailing market rate in the eastern Kentucky region.

The Defendant asserts that the firm of Boehl, Stopher & Graves is a defense-oriented firm of approximately fifty (50) lawyers practicing statewide and having extensive experience in civil rights and employment defense. Wells' counsel has been practicing since

1978. He asserts that, because of his personal friendship with Wells, Anderson has extended professional courtesy to Wells and has understated the actual time spent defending him in this case. Additionally, Anderson explains that he has obtained permission from judge Frazier's counsel to rely on his pleadings, legal arguments and authorities in an effort to further reduce the costs of this litigation.

Wells asserts that he is a prevailing party as defined by 42 U.S.C. § 1988. Therefore, in accordance with Rule 54 54(d)(2), Fed.R.Civ.P., and 42 U.s.C. § 1988, Wells seeks entry of an order and judgement directing Minix to pay reasonable attorney's fees incurred herein. Wells also seeks an award of interest accrued from the date of the award and for the court to stay the determination of the final amount of said fee award until after the completion of the plaintiff's appeal so that the award can include payment for any further time accrued during the appeal.

As set forth in *Hughes v. Rowe*, 449 U.S. 5, 14 (1980), Wells asserts that he has met the "frivolous, unreasonable or without foundation" standard and the bad faith standard for awarding Wells attorney's fees because this is the plaintiff's second effort to recover for essentially the same claims. He argues that the plaintiff's lack of success in the first instance should have put him on notice that the statute of limitations for those claims had expired. He contends that Minix's prior litigation efforts "should have 'restrained him from exposing defendant to repetitive litigation.'" *Hawkins v. Rhode Island Lottery Com'n*, 238 F.3d 112, 116 (1st Cir. 2001). Wells claims that his is a repetitious suit which was previously dismissed on statute of limitations grounds and affirmed on that basis by the Sixth Circuit and that the plaintiff's refiling constitutes "objective bad faith."

In response, Minix asserts that Wells is not entitled to attorney's fees because: (1) though the statute of limitations barred his claims, they were meritorious; and (2) this court erred in ruling that the Kentucky Supreme Court's ruling on his petition for an alias writ of habeas corpus did not extend the statute of limitations.

A. Standard

An award of attorney's fees to a prevailing party in a 42 U.S.C. § 1983 action is proper when: (1) the party seeking the award of attorney's fees has prevailed in the matter; (2) the fee request is reasonable; and (3) a satisfactory basis for the hours expended is reflected in the success achieved. See *Wayne v. Village of Sebring*, 36 F.3d 517, 531 (6th Cir. 1994).

B. Prevailing Party

Defendant George Keith Wells has been awarded a judgment in this action and the plaintiff's claims have been dismissed as having been barred by the statute of limitations. The plaintiff does not assert that Wells is not a prevailing party. Moreover, Defendant Wells has succeeded on the significant issue (i.e., the statute of limitations issue). Consequently, Wells is a prevailing party entitled to an award of attorney's fees in this action. See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

C. Reasonableness of Attorney's Fees/Success Reflected in Hours

To determine whether Defendant Wells' legal fees are reasonable, the court ordinarily would calculate the "number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. at 433, 424 (1983). Here, Wells seeks $4,873.55. Plaintiff Minix does not object to the amount and the court finds that the amount is within the prevailing market rate in eastern Kentucky.

The fact that this case has been pending since April 10, 2003, and that as of November 17, 2003, the record has swelled to 83 docket entries involving well over twenty motions, justifies the modest award sought by Wells. An expenditure of 42.5 hours at $110 per hour, for a total of $4,873.55, is clearly reasonable. Additionally, it is noted that counsel for Judge Frazier, another defendant to this action, conservatively seeks $5,700 as a reasonable attorney's fee for this case up to and until the date the plaintiff filed his notice of appeal on October 21, 2003. Consequently, the amount of the attorney's fee sought by Defendant Wells is more than reasonable.

D. The Standard for Attorney's Fee Award

The characteristics of this case meet the standards for awarding attorney's fees to counsel for a prevailing defendant. In *Roane v. City of Mansfield*, 229 F.3d 1153, 2000 WL 1276745 (6th Cir (Ohio)) (unpublished opinion), the Sixth Circuit stated that:

> Section 1988 places the award of reasonable attorney's fees within the discretion of the district court; however, the district court "must provide a clear and concise explanation of its reasons for the fee award." See *Hadix v. Johnson*, 65 F.3d 532, 534 (6th Cir. 1995) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)); *Louisville Black Police Officers Org., Inc v. City of Louisville*, 700 F.2d 268, 273 (6th Cir. 1983). . .
>
> Section 1988 provides that in cases brought pursuant to § 1983, "the court, in its discretion, may allow the prevailing party . . a reasonable attorney's fee as part of the costs . ." 42 U.S.C. § 1988(b). With respect to attorney's fees awarded to defendants in civil rights actions, this court has observed that "[a]n award of attorney's fees against a losing plaintiff in a civil rights action is an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986) (emphasis added). That is to say, attorney's fees may be awarded to prevailing defendants under § 1988 only when the plaintiff's suit "was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). [FN1. The standards set forth by the Supreme Court in *Christianburg* regarding "prevailing party" status for purposes of a Title VII claim, govern attorney's fee awards brought under § 1988. See Hughes v. Rowe, 449 U.S. 5, 14 (1980)] . . Awarding attorney's fees to prevailing defendant sin civil rights actions in only the most extreme and egregious cases of misconduct. . . comports with the purpose of § 1983. . . *York v. Ferris State Univ.*, 36 F.Supp. 2d 976, 980-83 (W.D. mich. 1998); see also Jeffrey J. Fowler, Annotation, *Right of Prevailing Defendant to Recover Attorneys' Fees Under §*

706(k) of Civil Rights Act of 1964 (432 U.S.C.A. § 2000 E-5(k), 134 A.L.R. Fed. 161 (1996).

Id. at **1

Likewise, in *Dubuc v. Green Oak Township*, 312 F.3d 736 (6th Cir. 2003), the court discussed the standards and procedures under which a district court may award attorney's fees to a prevailing defendant. Although the court overturned the district court's award, the applicable standards remain relevant to the determination in the case at bar. The fee issue in *Dubuc* was also based on 42 U.S.C. § 1988, "which allows fees to be awarded, at the judge's discretion, to the prevailing party in a § 1983 action." *Dubuc*, 312 F.3d at 754. The court added.

> Such fee awards to defendants are limited to instances of egregious misconduct by a plaintiff, based "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation . . And, needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith." *Christiansburg Garmet Co. v. EEOC* 434 U.S. 412, 421-22, 98 S. Ct. 694, 54 L.Ed.2d 648 (1978). See *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S. Ct. 173, 66 L.Ed.2d 163 (1980) (applying this standard to a case involving § 1983 and § 1988); see also *Riddle v. Egensperger*, 266 F.3d 542, 547 (6th Cir. 2001); *Jones v. Continental Corp.*, 789 F2d 1225, 1232 (6th Cir. 1986); *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 182 (6th Cir. 1985).

Id. at 754-755. Consequently, to determine whether Defendant Wells is entitled to an award of attorney's fees pursuant to 42 U.S.C. § 1988, this court must determine: (1) whether Minix's actions were "frivolous, unreasonable, or without foundation"; and (2) whether Minix brought or continued his claims in bad faith.

As this court has previously explained in its Memorandum Opinion and Order of October 9, 2003 [Record No. 68], on January 24, 2000, Minix filed *Marcus S. Minix Sr. v. Stephen N. Frazier and George Chad Perry*, Pikeville Civil Action No. 7:00-32 (hereinafter "00-32") which, like the case at bar, was a civil rights complaint and

which, like the case at bar, was based upon claims that Minix's right to due process during his divorce and custody proceedings had been denied by Kentucky courts. Because it was apparent from the face of the 00-32 complaint that Minix's claims were obviously barred by the statute of limitations, the Court (Judge Joseph Hood presiding) determined, by Memorandum Opinion and Order filed February 11, 2000, that *sua sponte* dismissal was appropriate.

Minix then, as in the case at bar, filed a motion to alter or amend, asserting that his action was not time-barred because the court had not given consideration to the merits of his claims. Minix's motion was denied and Minix appealed. The Sixth Circuit characterized Minix's case as being "patently meritless" and said that "the allegations in his complaint clearly show that his civil rights action was time-barred." See Memorandum Opinion and Order of October 9, 2003 [Record No. 68] at p. 8, quoting *Marcus S. Minix v. Stephen N. Frazier; George Chad Perry*, 4 Fed.Appx. 230, 2001 WL 128346 (6th Cir. (Ky.) Feb. 6, 2001) (unpublished disposition).

Thereafter, Minix went back to the Kentucky Supreme Court where he filed a petition for an alias writ of mandamus, which was denied by that court. Next, and in spite of an abundance of judicially rendered repudiating signals to him, Minix again returned to this court, with the presently considered, wholly repetitious and previously dismissed claims. Eventually, Minix asserted that the filing of the alias writ before the Kentucky Supreme Court somehow extended or refreshed the time in which the statute of limitations accrued for his claims.

This court concluded that Minix's "filing of the petition for an alias writ of mandamus was a contrived and ineffective action designed to revive the [expired] statute of limitations" and that Minix's interpretation of the Sixth Circuit's language was neither plausible nor credible but was, instead, factually baseless. See Record No. 68 at p. 13. The court noted that Minix spuriously attempted to claim that his own actions constituted a continuing violation by the defendants. Id.

Based upon these facts, this court now concludes that (1) Minix's

presently considered action is "frivolous, unreasonable and without foundation" within the meaning of *Christiansburg Garmet Co. v. EEOC*, 434 U.S. 412, 421-22, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) and Hughes v. Rowe, 449 U.S. 5, 14, 101 S. Ct. 173, 66 L.Ed.2d 163 (1980); (2) Minix both brought and continued the assert claims in bad faith; and (3) Minix's present re-assertion that the petition for alias writ of habeas corpus he filed before the Supreme Court of Kentucky somehow renewed or refreshed the statute of limitations for this action is patently wrong and constitutes further evidence of bad faith. Moreover, Minix's continuous re-assertions that the claims barred from this court's consideration by the statute of limitations allegedly had merit are irrelevant and afford him no defense. Consequently, plaintiff Minix has exhibited conduct that meets the applicable standards by which Defendant Wells is entitled to an award of attorney's fees.

Accordingly, it is hereby **ORDERED** that Defendant George keith Well's motion is **GRANTED** to the extent that he is awarded attorney's fees in the amount of $4,873.55, with interest to accrue on this amount from the entry of this Order at the legal rate. However, any request for attorney's fees incurred in connection with the Plaintiff's appeal to the Sixth Circuit should be addressed in the first instance with that court. Therefore, to the extent Defendant Wells' motion seeks a further award from this court or seeks to stay the court's final determination of the amount of the fee award, his motion is **DENIED**.

This 12th day of December, 2003.

s/Danny C. Reeves
United State District Judge

APPENDIX H

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 94-CA-2820-0A
ORIGINAL ACTION IN COURT OF APPEALS
REGARDING JOHNSON CIRCUIT COURT
Entered January 19, 1995

Marcus S. Minix, Sr. — Petitioner

v.

Stephen N. Frazier, Judge
Johnson Circuit Court — Respondent

ORDER GRANTING CR 76.36 RELIEF IN PART

Before: LESTER, CHIEF JUDGE; DYCHE, and McDONALD, JUDGES

The court has considered petitioner's petition for writ of mandamus and respondent's response thereto and, being sufficiently advise, ORDERS the petition be GRANTED IN PART.

Petitioner requests this court, inter alia, to find that all orders and judgments entered by respondent in *Marcus S. Minix v. Sherry Minix*, action number 86-CI-000010, subsequent to his first voluntary disqualification on September 18, 1987, are void. Petitioner contends that, since respondent had previously disqualified himself from this case, he had lost jurisdiction and could not later resume participation in the same case. Petitioner further requests that this court direct respondent to refer the matter to the Chief Justice for the appointment of a Special Judge. Petitioner cites, as authority for the relief he seeks, KRS 26A.015; SCR 4.300; *Wade v. Bondurant*, Ky., 625 S.W.2d 847 (1981) and *Weddington v. Lari*, Ky., 404 S.W.2d 451 (1966). He claims that, due to respondent' failure to refer the matter to the Chief Justice, he cannot get relief from Sherry Minix's denial of visitation.

Initially, we note that the second prong of the relief sought by petitioner is moot. Respondent referred the matter to the Chief Justice and the Chief Justice appointed a Special Judge, the honorable Charles E. Lowe, Jr., by order entered December 5, 1994.

However, we are of the opinion that petitioner's argument that respondent lost jurisdiction over the action below when he disqualified himself has merit.

Petitioner's dissolution proceedings were first assigned to respondent, Johnson Circuit Court, Division I. Subsequently, respondent disqualified himself and transferred the matter to Judge James A. Knight, Johnson Circuit Court, Division II. Judge Knight later recused himself. Respondent, then acting as Chief Regional Circuit Judge, attempted to assign a replacement but, apparently, was unable to do so and resumed participation in the case.

We agree with petitioner that a judge, once voluntarily disqualifying himself from a matter loses jurisdiction forever in the absence of an agreement of the parties, that he has no right to reassume jurisdiction and that any order entered by that judge, upon resuming participation in the case, is a nullity. See *Wade, supra.*, at 847; *Weddington, supra.*, at 452-53. Consequently, the Honorable Charles E. Lowe, Jr., Special Judge, is hereby DIRECTED to enter an order VACATING all orders and judgments entered by respondent in action 86-CI-000010 subsequent to respondent's first voluntary disqualification from that case.

The clerk of the Court of Appeals is DIRECTED to mail a copy of this order to the Honorable Charles E. Lowe, Jr., Judge of the Thirty-fifth Judicial Circuit, Division II.

Entered January 19, 1995
s/Chief Judge, Court of Appeals

APPENDIX I

SUPREME COURT OF KENTUCKY
95-SC-178-MR and 95-SC-195-MR

Stephen N. Frazier, Judge — Appellants/Cross Appellees
Johnson Circuit Court and

Sherry Minix
Real Party in Interest

Appeal From Court of Appeals
v. 94-CA-2820-0A
Entered August 25, 1995

Marcus S. Minix — Appellee/Cross Appellant

MEMORANDUM OPINION OF THE COURT

Affirming

This appeal is from an order of the Court of Appeals which granted in part the petition of Marcus S. Minix for a writ of mandamus and directed Special Judge Charles E. Lowe, Jr., to vacate all orders and judgments entered by Judge Stephen N. Frazier after his first voluntary disqualification from the case.

The issue we face as a reviewing court is whether the recusal of Judge Frazier and his later resumption of the bench was improper so as to require his orders to be found void.

This court affirms the decision of the Court of Appeals because once a judge has voluntarily disqualified himself from a matter, that judge loses the authority to actively participate in the absence of an agreement of the parties, and he has no authority to resume active participation or to enter any order in the case. Any order entered by the judge who attempt to resume active participation of the case is a nullity. *Wade v. Bondurant*, Ky., 625 S.W.2d 847 (1981); *Weddington v. Lair*, Ky., 404 S.W.2d 451 (1966).

In this case, there was no waiver agreement in writing in regard to

the actions of Judge Frazier after his original disqualification. Waiver cannot be presumed from silence. It must be in writing or otherwise memorialized in the record. *Small v. Commonwealth,* Ky. App., 617 S.W.2d 61 (1981). We do not accept the argument that Marcus Minix through his actions agreed to the resumption of the bench by Judge Frazier.

Once Judge Frazier voluntarily recused himself, he was expressly prohibited from exercising the power of Chief Regional Circuit Judge to appoint any special judge, including himself, to hear the case. Charter § IV.5. such authority passed to the Vice-Chief Regional Circuit Judge. The procedure provided for in the Charter was not followed. As noted by Judge Johnstone in his concurring opinion, the Charter provides in pertinent part that it is the duty of the Vice-Chief Regional Circuit Judge to exercise the assignment authority whenever the Chief Regional Circuit Judge disqualifies himself.

This dissolution f marriage proceeding file din 1986 was first assigned to Judge Frazier who then disqualified himself and transferred the matter to Judge James A. Knight of the Johnson Circuit Court. Judge Knight later recused himself. Judge Frazier, then acting as Chief Regional Judge, attempted to assign a replacement judge but was unable to do so, and then resumed his own participation in the case.

In 1991, Judge Frazier assigned the case to Judge Asbury. In 1994, Judge Asbury disqualified himself, and on December 13, 1994, the Chief Justice appointed special Judge Lowe. The case has also found its way to the Supreme Court on several occasions and review was denied on grounds other than are presented at this time. The original request of Marcus S. Minix for an appointment by the Chief Justice, pursuant to KRS 26A.015, is now moot by virtue of the order entered December 5, 1994 appointing Special Judge Lowe.

This court has considered the various arguments put forward by the parties in this case. The husband originally challenged the constitutionality of the administration charter providing for the regional judge system as unconstitutional. The husband also requested this court to certify various federal constitutional questions.

The wife argues that the husband failed to object to the resumption of the bench by Judge Frazier and should not be heard on this issue now. She also petitions this court to reverse the judgment of the Court of Appeals and hold that all orders entered by Judge Frazier and Judge Asbury be enforced.

In view of our decision in this matter, we decline to decide any of these issues because they are either moot or irrelevant. Pursuant to separate orders of this court, we have granted the motion to supplement the record and deny the motion to dismiss.

It is the holding of this court that one a judge voluntarily disqualifies himself from a matter, he loses authority to actively participate for all purposes and that the judge has no right to attempt to resume active participation. Any order entered by that judge upon attempting to resume participation in the case is a nullity. The order of the Court of Appeals granting in part a writ of mandamus pursuant to CR 76.36 is affirmed.

Stephens, C.J., and Fuqua, Lambert, Leibson, Reynolds and Wintersheimer, JJ., concur. Stumbo, JJ., not sitting.

Attorneys for Appellant/
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APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

Civil Action No. 7:03-113-DCR
June 30, 2003

Marcus S. Minix, Sr., Individually
Plaintiff

v.

Phillip Bruce Leslie and the law firm of
McBrayer, McGinnis, Leslie & Kirkland, et al.
Defendant

Motion to Dismiss

Comes now Hon. Phillip Bruce Leslie and the law firm of McBrayer, McGinnis, Leslie & Kirkland and moves the court to dismiss the complaint filed by the plaintiff herein as same is barred by the statue of limitations.

The plaintiff complains of various violations of his civil rights under various provision of Federal Civil Rights law. The statute of limitations for any civil right action arising in Kentucky is one year. *Collard v. Kentucky BD of Nursing*, 896 F.2d 179, 182 (6th Cir. 1990).

Thus, with the complaint being filed on April 10, 2003, Mr. Minix would have to allege a violation of his civil rights by the Defendant, Phillip Bruce Leslie and the law firm of McBrayer, McGinnis, Leslie & Kirkland, on or before April 10, 2002.

Though the complaint makes various unfounded and ridiculous claims against the law firm and Mr. Leslie, a reading of the complaint shows that none of the conspiratorial acts alleged actually occurred after April 10, 2002.

After having been turned away by the Federal District Court and 6th Circuit in an action very similar to this one, Mr. Minix, obviously in hopes of having a new statute of limitations, field an alias writ of mandamus in the Kentucky Court of Appeals. It was obviously Mr. Minix's hope that by filing yet another proceeding in the Kentucky Court of Appeals that he could effectively create a new statue of limitations for the alleged violations of his civil rights in his divorce case. This court should not be taken in by Mr. Minix's actions.

Mr. Minix has litigated his divorce case many times through the circuit courts of Kentucky, the Court of Appeals of Kentucky and the Supreme Court of Kentucky. He has been to the United States Bankruptcy Court, the 6th Circuit Court of Appeals and attempted to have his case hear through the U.S. Supreme Court. He has also filed more than one original action in the United States Federal District Court and has taken that case to the 6th Circuit Court of Appeals.

Each time each court thought they had laid this matter to rest, but Mr. Minix continues to want to litigate obviously for the pure pleasure of incitement of those who have seen that justice was done and that his daughters were not allowed to be given to the custody of someone like him.

The court should realize and understand that the basis of Mr. Minix's complaint are that his civil rights were violated by his daughters being taken from him and the allegations that no property settlement was ever made in his divorce case. All these allegations, though, have been decided more than a year ago by the courts. The Court of Appeals found that in his most recent writ of mandamus Mr. Minix was "attempting to revisit issues that were previously reviewed and disposed of in *Minix v. Minix*, 1996 C.A. 1880-MR." That case was filed in the late 1990s.

Thus, Mr. Minix's complaints seemed to have accrued long ago and no case was filed on them. As such, McBrayer, McGinnis, Leslie & Kirkland and Hon. Phillip Bruce Leslie would request that this court dismiss Mr. Minix's complaint as it is barred by the statute of limitations.

In writing this response, the court should realize that counsel has not addressed the meritoriousness of Mr. Minix's claims. Lest there be any doubt, it is clear that Mr. Minix's claims are ridiculous and have absolutely no truth to them.

Wherefore, Defendants prays that this case be dismissed and for any and all other relief to which they may appear entitled.

McBrayer, McGinnis, Leslie & Kirkland
P. O. Box 280
Greenup, KY 41144-0280
Phone: (606) 473-7303
Telecopier: (606) 473-9003

by: Hon. R. Stephen McGinnis
Attorney for Phillip Bruce Leslie and McBrayer,
McGinnins, Leslie & Kirkland

I hereby certify that a true and correct copy of the foregoing has been mailed to:

Mr. Marcus S. Minix, Sr.
P.O. Box 1687
Paintsville, KY 41240

Hon. D. Brent Irvin
Assistant Attorney General
Capitol Building, Suite 118
Frankfort, KY 40601

Hon. George Keith Wells
P. O. Box 1669
Paintsville, KY 41240

Hon. G. Chad Perry
P. O. Box 900
Paintsville, KY 41240

This 30th day of June 2003
s/Hon. R. Stephen McGinnis

APPENDIX K

SUPREME COURT OF KENTUCKY
October 18, 1983

Order Adopting Regional Administration Program Charter

Effective December 1, 1983, Regional Administration of the Circuit and District Courts shall be governed by the provisions of the Regional Administration Program Charter, attached as the appendix to this order.

This Charter supersedes (1) the Regional Administration Pilot Program Charter, as amended and promulgated under order of this Court dated December 5, 1977, (2) the order of the Chief Justice establishing Transitional Provisions dated November 23, 1977, (3) the Regional Administration Program Charter as revised and promulgated under order of this court dated October 8, 1980, (4) the order of this court relating to the judicial assignment authority of Chief Regional District judges entered February 25, 1982, and (5) the Regional Administration Program Charter as revised and promulgated under order of this court dated February 3, 1983.

Entered October 18, 1983
s/Robert Stephens
Chief Justice

Regional Administration Program Charter

Pursuant to Sections 110(5)(b) and 112(4) of the Kentucky Constitution, the following Charter is established to effect regional administration of the circuit and district courts.

Section I. Name of the Program

This program shall be known as the Regional Administration Program and shall continue from the date of the entry of this order until further order of this court.

Section II. Administrative Regions

Eight administrative regions are created and designated as follows:

1. The first regiona, the Purchase Region, shall consist of the 1st, 2nd, 3rd, 4th, 5th, 7th, 42nd, 45th, 51st, 52nd and 56th Judicial Circuits and Judicial Districts.

2. The second region, the Green River Region, shall consist of the 6th, 8th, 9th, 10th, 38th, 43rd, 46th and 49th Judicial Circuits and Judicial Districts.

3. The third region, the Cumberland Region, shall consist of the 11th, 26th, 27th, 28th, 29th, 34th, 40th, 41st and 44th Judicial Circuits and Judicial Districts.

4. The fourth region, the Metro Region, shall consist of the 30th and 55th Judicial Circuits and Judicial Districts.

5. The fifth region, the Bluegrass Region, shall consist of the 13th, 14th, 23rd, 25th, 48th and 50th Judicial Circuit and Judicial Districts.

6. The sixth region, the Northern Region, shall consist of the 12th,15th, 16th, 17th, 18th, 19th, 53rd and 54th Judicial Circuits and Judicial Districts

7. The seventh region, the Mountain Region, shall consist of the 20th, 21st, 24th, 31st, 32nd, 33rd, 35th, 36th, 37th, 39th, and 47th Judicial Circuits and Judicial Districts.

8. The eighth region, the Fayette Region, shall consist of the 22nd Judicial Circuit and Judicial District.

Section III. Purpose of the program

The Regional Administration Program has three goals:

1. to expedite disposition of litigation in the regions through equalization of work among the judges;

2. to promote uniform procedures and practices within regions and throughout the state;

3. to provide for prompt substitution where a judge is disqualified or where there is temporary vacancy.

Section IV. Chief Regional Judges

1. A chief regional circuit judge shall be appointed or reappointed by the Chief Justice every two years beginning December 1, 1983. His duties, relating to the circuit courts of the region, shall be as follows:

a. to plan, coordinate and supervise the activities of the regional administration program, together with the chief regional district judge, within the region;

b. to exercise within the region the judicial assignment authority (Kentucky Constitution Section 110(5)(b) which is hereby delegated to him by the Chief Justice;

c. to exercise within the region the judicial assignment authority for appointment of retired judges who consent to appointment which is hereby delegated to him by the Chief Justice;

d. to exercise, in coordination with other chief regional circuit and district judges, authority for assignment of judges from one region to another with the consent of the appropriate chief regional circuit or district judge;

e. to require each judge to reserve periods of time of such length and frequencies as the chief regional judge deems appropriate interspersed throughout each calendar year to be available for assignment in other circuits; and

f. to call or cause to be called the docket of any circuit for the purpose of dismissing pending actions for failure to prosecute or reduce delay.

2. Notwithstanding the provisions of SCR 1.040(2) the chief regional judge appointed by the Chief Justice for the eighth region consisting of the 22nd Judicial Circuit shall also serve as chief judge of that court and if the chief regional judge appointed by the Chief Justice for the fourth region consisting of the 30th and 55th Judicial Circuits

is a judge of the circuit court for the 30th circuit, the chief regional judge shall also act as chief judge of that court.

3. Selection and duties of chief regional district judges.

A chief regional district judge shall be appointed or reappointed by the Chief Justice every two years beginning December 1, 1983. His duties relating to the district courts of the region, shall be as follows:

a. to plan, coordinate and supervise the activities of the regional administration program, together with the chief regional circuit judge, with the region;

b. to exercise within the region the judicial assignment authority (Kentucky Constitution Section 110(5)(b) which is hereby delegated to him by the Chief Justice;

c. to exercise within the region the judicial assignment authority for appointment of retired judges who consent to appointment which is hereby delegated to him by the Chief Justice;

d. to exercise, in coordination with other chief regional circuit and district judges, authority for assignment of judges from one region to another with the consent of the appropriate chief regional circuit or district judge;

e. to require each judge to reserve periods of time of such length and frequencies as the chief regional judge deems appropriate interspersed throughout each calendar year to be available for assignment in other circuits; and

f. to call or cause to be called the docket of any circuit for the purpose of dismissing pending actions for failure to prosecute or reduce delay.

4. Notwithstanding the provisions of SCR 1.040(2) the chief regional judge appointed by the Chief Justice for the eighth region consisting of the 22nd Judicial Circuit shall also serve as chief judge of that court and if the chief regional judge appointed by the Chief Justice for the fourth region consisting of the 30th and 55th Judicial

Districts is a judge of the district court for the 30th district, the chief regional judge shall also act as chief judge of that court.

5. Selection and duties of Vice-Chief Regional Circuit Judges.

A vice-chief regional circuit judge shall be appointed or reappointed by the Chief Justice every two years beginning with December 1, 1983. It shall be the duty of the vice-chief regional circuit judge to exercise the judicial assignment authority of the chief regional circuit judge whenever the chief regional circuit judge disqualifies himself from a case, is otherwise unavailable, or the office of the chief regional circuit judge is vacant, and the assignment of a special judge is required.

6. Selection and duties of Vice-Chief Regional District Judges.

A vice-chief regional district judge shall be appointed or reappointed by the Chief Justice every two years beginning with December 1, 983. It shall be the duty of the vice-chief regional district judge to exercise the judicial assignment authority of the chief regional district judge whenever the chief regional district judge disqualifies himself from a case, is otherwise unavailable, or the office of chief regional district judge is vacant, and the assignment of a special judge is required.

Section V. Judicial Assignment Authority of Chief Regional Judges

1. The following procedures are established to implement the judicial assignment authority, delegated herein, of the chief regional circuit judges:

a. If a special judge assignment is necessary the judge requiring the appointment of a special judge shall notify the chief regional circuit judge in his region as soon as possible. If the need is occasioned by disqualification, the grounds of the disqualification shall be certified to the chief regional circuit judge. The judge requesting shall also notify the circuit clerk(s) in the affected county or counties.

Upon notification of the need for a special judge, the chief regional circuit judge, will by written order, appoint a circuit

judge within the region or, if none is available, request the chief regional district judge of the region to designate a qualified district judge within the region who consents to the appointment, to serve as special judge for a designated time period. The chief regional circuit judge shall make the appointment and mail the designation order to the appropriate circuit clerk. A copy of the designation order shall be retained by the chief regional district judge and a copy shall be sent to the special judge, to the requesting judge, and to the AOC.

b. If no district judge or consenting circuit judge or consenting retired judge is available within the region to hear the matter requiring a special judge, the chief regional district judge may request a chief regional district or circuit judge of another region to designate a special judge who consents to the appointment to hear the matter. The requesting chief regional district judge shall make the appointment.

c. If affidavits alleging non-impartiality are filed by a party, the facts shall be certified to the Chief Justice by the circuit clerk pursuant to KRS 26A.020.

3. Where, under this Charter, a conflict arises that cannot be resolved by the exercise of the judicial assignment authority of a chief regional judge, delegated herein, the matter shall be referred to the Chief Justice for resolution.

4. It shall be the duty of the Director of the AOC or his designee to maintain records on the numbers and kinds of cases assigned by the chief regional judges within and among the regions, and to provide to the chief regional judges such information as may be required to make decision concerning judicial assignments.

APPENDIX L

United States Constitution, Amendment XIV § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any aciton brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statue the District of Columbia.

42 U.S.C. § 1985(2)

It two or more person conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

42 U.S.C. §1986

Every person who, having knowledge that any of the wrongs

conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

F.R.C.P. 56
Rule 56 for Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the aciton or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as tot he amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trail of the action the facts so specified shall be deemed established, and the trail shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on person knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or part thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the

affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1964, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987]